

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF AND APPENDIX FOR APPELLANT,
HAROLD G. ARON**

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,288.

70

HAROLD G. ARON, *Appellant,*

v.

**KATHARINE M. DRIER, BERNARD J. GALLAGHER,
and M. WALTON HENDRY, *Appellees.***

**APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA DENYING A
MOTION FOR AN ORDER ADJUDGING APPELLEES
IN CONTEMPT OF COURT AND REQUIRING
THEM TO RESTORE FUNDS TO THE
REGISTRY OF THE COURT**

**United States Court of Appeals
for the District of Columbia
Circuit**

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Joseph W. Stewart

CLERK

**HAROLD G. ARON,
726 Jackson Place,
Washington, D. C.,
and**

**RICHARD L. MERRICK,
1025 Vermont Ave., N. W.,
Washington 5, D. C.,
*Attorneys for Appellant.***

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BRIEF ON BEHALF OF APPELLANT.

Jurisdictional Statement.

This is an appeal from a final order of the United States District Court for the District of Columbia, dated March 18, 1949, denying a motion of appellant for an order adjudging appellee, plaintiff below, and her counsel, Bernard J. Gallagher, Esquire, and M. Walton Hendry, Esquire, in contempt of court and requiring them to restore funds to the Registry of the Court Below (App. 71, R. 235).

More than \$3,000.00 is involved in this controversy.

Statement of the Case.

In 1928 appellant became counsel for appellee, Katharine M. Drier, also known as Baroness Katharine von Rosenberg Drier, with respect to an estate inherited by her from her deceased husband which had been seized and sold by the German Government during the First World War. She previously had filed her claim for indemnity and, through counsel other than appellant, had agreed to accept \$48,000.00 as an award of the Mixed Claims Commission, United States and Germany (App. 38, R. 161). Appellant succeeded in reopening her case and procuring for her an award of the Mixed Claims Commission, United States and Germany, in the amount of \$250,000.00, which, with interest, totaled more than \$500,000.00. She received thereon about \$400,000.00. Appellant sought a further and additional award and procured an agreement of the German Government to pay Mrs. Drier an additional \$160,000.00, with interest, but the German Government later repudiated that agreement, and refused to permit the Mixed Claims Commission, United States and Germany, to enter a further award in accordance with such agreement. Appellant then procured the enactment by Congress of a private act (App. 39, R. 162), known as Private Law No. 509, approved July 19, 1940 (App. 1, 4, R. 11, 20), directing the Secretary of the Treasury to pay the agreed amount out of German funds then in possession of the Treasury Department (App. 39, R. 162).

During the years 1928 to 1941, appellant advanced to or borrowed for appellee, Katharine M. Drier, on his personal guarantee, over \$50,000.00, in order to sustain her and her dependents. Appellant also spent weeks in Europe in her behalf, defending her against charges of fraud, and in procuring her release from prison. Appellant also successfully protected her in lawsuits brought against her in

this country, and in securing recoveries in legal proceedings brought in her behalf (App. 40, R. 162).

As a result of the private Act of Congress referred to, appellee Drier, in 1941, became entitled to receive \$160,000.00. Of this amount, \$20,000.00 was paid to discharge a note guaranteed by appellant, and, at the request of appellee Drier, \$40,000.00 was left in the Treasury of the United States to be paid to appellant, who was involved in litigation with his former wife, in order that appellee Drier might obtain payment of the balance of \$100,000.00 (App. 40, R. 163).

When appellee Drier failed to pay appellant, for his 12 years of service in this country and abroad, which directly or indirectly resulted to the benefit of the appellee Drier to the extent of upwards of \$1,000,000, a fee of \$250,000.00 and approximately \$25,000.00 for payments made or disbursements met on her behalf, appellant brought in the United States District Court for the District of Columbia civil action No. 12,832 (App. 41, 46, R. 163). While that action was pending, appellee Drier on April 16, 1943 (App. 20, R. 8, 62) brought in the Court Below civil action No. 19,367, out of which this appeal arises, against the Secretary of the Treasury (App. 20, R. 62, 163), who, on July 27, 1943, paid into the Registry of the Court below \$54,497.32 and interpleaded this appellant and others (App. 20, R. 62). This fund included the \$40,000.00 above referred to which was left in the Treasury of the United States for this appellant. On May 2, 1945, while both civil actions Nos. 12,832 and 19,367 were pending, appellant and appellee Drier entered into a settlement agreement bearing that date (App. 20, 42, R. 63, 164), a copy of which appears in the record at pages 240 and 241 (See also, App. 13-15, R. 47 and 48). That agreement, which is in the form of a letter from Appellee Drier to this appellant, begins:

"It is my desire that you resume your representation of me in collecting balances due on awards of the Mixed Claims Commission and Private Law No. 509, aggregating approximately \$350,000. * * *"

and provides

"As to pending litigation between us, it is my understanding that you are agreeable to this being discontinued by both of us * * *

"It is also understood that on all future amounts recovered on these awards and under Private Law No. 509, or on any future awards, you are to receive thirty per cent (30%) in full for your services and that this percentage is to be based upon the amount actually received, whether the same is designated as principle (sic) or interest, and by whatever means recovered, including, but not limiting the same, by litigation, general or special legislation, negotiation, or by diplomatic settlement. * * *

"The fund now deposited in the Registry of the United States District Court for the District of Columbia is to be treated as a fund to meet present necessities, and to permit the prosecution and collection of the balances due to me. The decision of this fund, as hereinafter provided, is not to be treated as in any way a final settlement or determination of any of our rights; such final settlement or determination being left in its entirety to the future by means of an accounting and arbitration, as hereinbefore set forth, at such time as my remedies have been exhausted in an effort to collect the balances due to me, or at such earlier time as either of us may require the same to be so settled and determined.

"The fund now deposited in the Registry of the Court shall be used by me in the following manner:

"One-third ($\frac{1}{3}$) thereof I shall retain and make use of for my personal needs and requirements as I see fit;

"One-third ($\frac{1}{3}$) thereof I shall use to buy up claims against you on the part of those who have intervened in the pending suit, or such other claims as you may designate, including the claims of your wife, and sister-in-law, for monies advanced to you since 1940, all in such amounts as shall be designated by you or by Court Order;

“The remaining one-third ($\frac{1}{3}$) is to be treated as a reserve to permit the prosecution of my claim, and for my maintenance. You are to be entitled to draw against it for actual out-of-pocket disbursements made by you on my behalf, with my prior approval, and each of us is to be permitted to draw the sum of Three Hundred Dollars (\$300) per month. Such drawings to be treated as an advance or loan to be taken into account in the general or final accounting. * * *

It was specifically understood and agreed that when payment was made by the clerk of the Court of the funds in the registry of the Court, such payment would be by check to the order of Herman J. Galloway, then counsel for this appellant, and Bernard J. Gallagher, counsel for appellee Drier, who were to disburse the funds in accordance with the terms of the agreement (App. 42, 43, R. 164, 165, 169).

Following the making of the settlement agreement, appellee, Drier, through her counsel, Bernard J. Gallagher, filed a motion for summary judgment in her favor and on September 12, 1945, a motion to approve the settlement agreement of May 2, 1945, and to “direct the Clerk of the Court to pay the fund of \$54,497.32 now deposited in the Registry of this Court to Bernard J. Gallagher and Herman J. Galloway as attorneys, respectively, for Katharine M. Drier and Harold G. Aron for disbursement by them in accordance with the agreement of settlement made between Katharine M. Drier and Harold G. Aron” (App. 21, 22, 42, 43, R. 64, 65, 164-5). In his supporting memorandum, Mr. Gallagher made the same statements and the same request (App. 21, 22, R. 65). The final judgment of the Court below, dated November 15, 1946, provided that “the settlement agreement of May 2, 1945, between plaintiff” (Mrs. Drier) “and Harold G. Aron is approved,” (App. 3, R. 17, 18) but instead of directing payment of the funds to Mr. Gallagher and Mr. Galloway, as had been requested by Mrs. Drier and her counsel Mr. Gallagher, the judgment,

which was prepared by Mr. Gallagher, directs that the Clerk "pay plaintiff Drier and to Bernard J. Gallagher her attorney, jointly, the sum of \$36,331.55 less the Clerk's fee incident thereto, being two-thirds of the funds deposited in the registry" of the Court * * * "the balance of the funds, \$18,165.77 is to remain in the registry of this Court pending further order of this Court" (App. 3, R. 18).

Following affirmance of the judgment of November 15, 1946, by the United States Court of Appeals for the District of Columbia Circuit and denial of certiorari by the Supreme Court of the United States (App. 34, 35, R. 155, 156) Mr. Aron, realizing that the funds in the registry of the Court below soon would be subject to withdrawal, telegraphed Mr. Gallagher on June 26, 1948, in substance not to do anything with respect to withdrawal of the funds until he, Mr. Aron, arrived in Washington; stating that the agreement provided for the payment of the funds to Mr. Gallagher and Mr. Galloway (in this he was mistaken, as the agreement to have the funds paid to Messrs. Gallagher and Galloway was oral, but it was confirmed in writing by Mr. Gallagher in his motion for Court approval of the written settlement and in the supporting memorandum filed therewith); advising that he had consented to no change in the arrangement for payment of the funds to trustees; and concluding with the statement that he was sure Mr. Gallagher would not act without his consent, otherwise he would hold him, Mr. Gallagher, personally liable (App. 16, 17, 55, R. 53, 54, 166, 172). Mr. Gallagher did not reply to that telegram until August 5, 1948, when he advised Mr. Aron that the funds had been paid to Mrs. Drier, less his fee (App. 50, R. 172). On June 30, 1948, Mr. Aron talked with Mr. Gallagher on the telephone and asked him whether the mandate had come down from the Supreme Court, and what provision he was making for disbursement of the funds. Mr. Gallagher stated in substance that Mrs. Drier

was "on his neck" and that he could not do other than collect and disburse the money to her without regard to Mr. Aron's rights, unless he was served "with some kind of court papers" (App. 16, 43, R. 53, 54, 165), "which would give him an excuse and a reason for not doing so" (App. 17, R. 54). Mr. Aron thereupon called his attorney and on the morning of July 1, 1948, about 10:15, a motion and supporting memorandum were served on Mr. Gallagher (App. 17, 43, R. 54, 165). That motion was one to modify the judgment in such manner as to make it conform to the agreement between Mrs. Drier and Mr. Aron, which was approved by the Court (App. 36, 37, R. 157, 158), and the specific arrangement for payment of the funds to a trustee or trustees, so that disbursement would be made in accordance with the settlement agreement and the representations made to the Court by Mrs. Drier and her counsel in their motion for approval of the settlement agreement, as well as in the memorandum filed in support of such motion (App. 16, R. 52, 53). When served with said motion, Mr. Gallagher and his associate, Mr. Hendry, both stated that the funds had already been received and "paid out" (App. 43, 44, R. 165), which was not true, as the funds were represented by a check, dated June 30, 1948, issued by the Clerk of the United States District Court for the District of Columbia, which was deposited in the special account of Mr. Gallagher in the Union Trust Company of Washington, D. C., on July 1, 1948, the same day on which the motion was served on Mr. Gallagher and Mr. Hendry, and was not withdrawn therefrom until July 6, 1948 (App. 44, 53, 54, R. 166, 179, 182, 183). The check was paid over the counter at the Treasury Department to a messenger of the Union Trust Company of Washington, D. C., on July 2, 1948 (App. 45, R. 166). The record shows that the entire amount of the deposit was withdrawn from Mr. Gallagher's special account on July 6, 1948, apparently in cash. The

apparent purpose of this was to avoid attachment of the funds in Mr. Gallagher's hands and to assist Mrs. Drier in removing the money from the jurisdiction of the Court below. While Mr. Aron's attorney was in the offices of appellees Gallagher and Hendry on July 1, 1948, serving the said motion to modify the final judgment, Mrs. Drier came in and was introduced to Mr. Aron's attorney, who then left a copy of the motion and supporting memorandum and departed (App. 36-38, R. 157, 158, 165). That motion was filed in the clerk's office of the United States District Court for the District of Columbia on July 1, 1948 (App. 36, R. 157). Mrs. Drier's presence in the office of her counsel was for the purpose of arranging for receipt of the funds in question, and further demonstrates the untruth of her counsel's statement that the money already had been paid out. Mr. Gallagher also stated to Mr. Aron's attorney that no additional Court order had been obtained and none was necessary (App. 44, R. 166), which also was untrue, as an *ex parte* order, dated June 30, 1948, was prepared by Messrs. Gallagher and Hendry and presented to Judge Schweinhaut for signature on June 30, 1948 (App. 34-36, R. 155, 156, 202, 203). This appears to be the only order signed by the Court in this case without notice to other counsel, some seven or eight in number, whose appearances were entered for various parties to the litigation (App. 44, R. 166). Judge Schweinhaut testified that the signing of that order of June 30, 1948, without notice to other counsel in the case was a departure from his usual procedure (App. 67, R. 210, 211). Immediately after receiving her portion of the funds, Mrs. Drier left the District of Columbia and has been out of the jurisdiction of the Courts of the District of Columbia ever since (App. 45, R. 166, 167). The withdrawal of the funds from the bank and payment thereof to Mrs. Drier by her counsel occurred after the service and filing of the motion to modi-

fy the judgment, while it was pending, and before a hearing was had thereon (App. 53, R. 179).

The facts with respect to the actions of Mrs. Drier and her counsel are set forth by appellant in affidavit form under oath. Such affidavits appear in the Appendix at pages 38 to 51, and 56 to 64, and in the record at pages 161 to 172, inclusive, and 187 to 193, inclusive. Mrs. Drier and her counsel, Mrs. Gallagher and Mr. Hendry, have never answered, explained, or denied the facts set forth in Mr. Aron's affidavits, either under oath or otherwise. When asked by Judge Ben Moore to file an affidavit or give sworn testimony, Mr. Gallagher made excuses therefor and said he could not recall the facts sufficiently to make an affidavit (App. 30, R. 120).

Statutes Involved.

The statutes involved in this matter are:

Sec. 851, Title 28, United States Code, in effect June 30, 1948 (now Sec. 2041, Title 28, United States Code).

Sec. 852, Title 28, United States Code, in effect June 30, 1948 (now Sec. 2042, Title 28, United States Code).

Statement of Points.

1. The actions of appellee Drier in removing from the jurisdiction of the Court below the subject-matter of a pending proceeding constitutes contempt of Court.
2. The actions of Messrs. Gallagher and Hendry in assisting the appellee Drier in removing from the jurisdiction of the Court below the subject-matter of a pending proceeding constitutes contempt of Court.

3. The action of the Court below in denying the motion of appellant to adjudicate appellees in contempt constitutes prejudicial error.
4. The action of the Court below in not requiring appellees to restore the sum of \$31,018.23 to the registry of the Court below constitutes prejudicial error.
5. Where a mistake has occurred in a judgment, it may, and properly should be, corrected by the Court at any time.
6. Failure of the Court below to correct its judgment of November 15, 1946, constitutes prejudicial error.
7. The order of withdrawal of funds from the registry of the Court below was one required by statute, and should not have been entered without notice to all parties in interest.

Summary of Argument.

The removal by appellees from the jurisdiction of the Court below the subject-matter of a pending motion affecting its disposition constitutes contempt of Court.

After obtaining the Court's approval of the settlement agreement of May 2, 1945, between Appellee Drier and Appellant Aron, appellees were bound by its terms and were under obligation to see that it was carried out. Their conduct in disposing of a large part of the subject-matter of this litigation while a motion was pending seeking compliance with the settlement agreement amounts to wilful contempt of Court.

The actions of counsel for appellee Drier in making statements to lull into inaction appellant and his attorney demonstrate that their conduct was wilful and contemptuous.

Removal of funds from the jurisdiction of the Court after the filing of a motion involving the disposition of such

funds and before the Court below could act thereon constitutes contempt of the authority and power of the Court below.

Any act which would render the judgment of a Court impossible of performance constitutes contempt of Court.

Appellees had no right to assume that the Court below, in acting on the motion to modify its judgment, would not grant the relief sought by the motion.

The lower Court had ample power to modify its judgment. Appellant's motion to modify the judgment to carry out the agreement, which was approved by the Court, between Mrs. Drier and Mr. Aron, was meritorious. Appellees' actions in assuming that the Court would not grant appellant's motion were contemptuous.

The purpose of contempt proceedings is to uphold the power of the Court and to secure to suitors their rights.

Argument.

Since the paramount question involved is the contempt of appellees and the other questions are related thereto, the foregoing points will be considered together.

Contempt of Appellees.

The facts of record indisputably show that the appellees, while a motion to modify the judgment of the court below of November 15, 1946, was pending, knowingly and intentionally removed from the jurisdiction of the court below the subject-matter of that proceeding, thus rendering impossible the carrying out of the court's judgment had the court, as it properly should have, granted the motion to modify the judgment. The conduct of appellees demonstrates a callous attitude toward the dignity of the court below, a lack of respect for its authority, an utter disregard

of the rights of appellant, and a total want of appreciation of the effect of contractual obligations.

The wilful removal of the subject-matter of litigation from the jurisdiction of the Court pending the Court's action is a contempt of Court, no matter what the decision of the Court may be.

Merrimack River Savings Bank v. City of Clay Center, 219 U. S. 527, 31 S. Ct. 295, 55 L. Ed. 320 (1911).

Clay v. Waters, 178 Fed. 385, 391, 101 CCA 645.

Wartman v. Wartman, 29 F. Cas. No. 17,210.

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In re Fair, 41 Kan. 276, 21 P. 273 (1889).

State v. Silver Bow County Dist. Ct., 33 Mont. 359, 83 P. 641 (1906).

Lowenthal v. Hodge, 120 App. Div. 304, 105 N. Y. S. 120 (1907).

Berry v. Midtown Service Corp., 104 F. 2d 107, 122 A. L. R. 134 (1939).

Interference with property in the custody of the Court is contempt of Court.

Lamb v. Cramer, 285 U. S. 217, 52 S. Ct. 315, 76 L. Ed. 715 (1932).

Merrimack River Savings Bank v. City of Clay Center, 219 U. S. 527, 55 L. Ed. 320 (1911).

U. S. v. Shipp, 203 U. S. 563, 51 L. Ed. 319 (1906).

Wartman v. Wartman, 29 Fed. Cas. No. 17,210.

Clay v. Waters, 178 F. 385 (CCA 8th).

In re Swan, 150 U. S. 637, 14 S. Ct. 225, 37 L. Ed. 1207 (1893).

Converse v. Highway Const. Co. of Ohio, 107 F. 2d 127 (1939).

Denver-Greeley Valley Water Users Assoc. v. McNeil, *et al.*, 131 F. 2d 67, 69 (1942).

It is peculiarly the duty of an attorney to maintain the respect due the Courts, and any breach of such duty is a contempt of Court.

In re Pryor, 18 Kan. 72, 26 Am. Rep. 747.

Huggins v. Field, 196 Ky. 501, 244 S. W. 903.

Melton v. Com., 160 Ky. 642, 170 S. W. 37.

In re Mindes, 88 N. J. L. 117, 95 A. 743.

"Deceit of an attorney may be punished as a contempt if the deceit is an abuse of the functions of his office"

Clark v. U. S. 289 U. S. 1, 12, 53 S. Ct. 465, 77 L. Ed. 993, 999 (1933).

See also *Bowles v. U. S.*, 50 F. 2d 848, 851 (CCA 4th) (1931).

U. S. v. Ford, 9 F. 2d 990 (D. C.) (1925).

"Attorneys at law bear an important relation to the Courts before which they practice. They are in a very real sense officers of the Court; and the proper and orderly administration of justice depends in a very large measure upon their character and fidelity".

Bowles v. U. S., 50 F. 2d 848, 851 (1931).

Any act calculated to embarrass, hinder or obstruct the Court in the administration of justice is a contempt.

U. S. v. Pearson, 62 Fed. Sup. 767 (1945).

See also *Nye v. U. S.*, 313 U. S. 33, 85 L. Ed. 1172 (1949).

The purpose of contempt proceedings is to uphold the power of the Court and to secure to suitors their rights.

Converse v. Highway Const. Co. of Ohio, Inc., 107 F. 2d 127 (1939).

Bessette v. Conkey Co., 194 U. S. 324, 327, 24 S. Ct. 665, 48 L. Ed. 997, 1001 (1904).

The affidavits of Mr. Aron of August 26, 1948, filed in the Court below on August 27, 1948 (App. 38-51, R. 161-172) and of October 29, 1948, filed November 3, 1948 (App. 56-64,

R. 187-193) show that on July 1, 1948, untrue statements were made by Mr. Gallagher and Mr. Hendry that the money in the registry of the Court already had been received by them and "paid out". These statements were made at the time of the service upon them of the motion of appellant to modify the final judgment to make it conform to the agreement between Mrs. Drier and Mr. Aron and the representations made in writing by Mr. Gallagher prior to the time the judgment of the Court below was entered that the funds were to be paid to Mr. Gallagher and Mr. Galloway, attorneys, respectively, for Mrs. Drier and Mr. Aron, such funds to be disbursed by them in accordance with the provisions of the settlement agreement of May 2, 1945. The representation that the funds were to be paid to Mr. Gallagher and Mr. Galloway formed the basis for or, at least, was a part of the basis upon which the Court granted summary judgment in favor of Mrs. Drier and approved the settlement agreement of May 2, 1945, between Mrs. Drier and Mr. Aron. Appellees knew on July 1, 1948, when the said motion was served that the funds were still under their control. They further knew that if the Court should modify the judgment, as it properly should, to make it carry out the representations made by them to the Court below and they had distributed or appropriated the money withdrawn from the registry of the Court, performance of the Court's judgment as modified would have been impossible. With such knowledge, appellee Drier, with the aid and assistance of appellees Gallagher and Hendry, left the District of Columbia having defiantly removed from the jurisdiction of the Court below substantially two-thirds of the entire subject-matter of the proceeding then pending.

The facts further show that representations and statements made by Mr. Gallagher, apparently for the purpose of lulling Mr. Aron and his attorney into inaction, that no

additional Court order had been obtained and none was necessary, were not in accordance with the facts. The obvious purpose of such representations was to prevent Mr. Aron from attaching the funds in Mr. Gallagher's hands or instituting any proceeding in Court to restrain or enjoin their removal from the jurisdiction of the Court until they, appellees, could remove the funds, or a substantial part, beyond the jurisdiction of the Court below. Since they had not removed the funds from the jurisdiction of the Court below before the motion to modify the judgment was filed, they had no right to assume what the Court's action on the motion would be—that was the Court's function—and their subsequent actions clearly constitute contempt of the lower Court, which should have so found. Assuming that the Court will act in a certain way and then making impossible the performance of the Court's judgment should the opposite view be adopted, is a clear and unmistakable contempt of the authority of the Court. For attorneys, who are officers of the Court, to so act is doubly improper.

Applicability of Decided Cases to this Case.

In the Merrimack River Savings Bank case, cited above herein, the Supreme Court of the United States, by Mr. Justice Lurton, said, among other things:

“The present petition alleges that after this court had made an order dismissing said appeal, but before any mandate had issued or could issue under the rules of this court, and pending the right of petitioners to file an application for a rehearing, since filed and now pending, certain of the defendants to said appeal * * * had by force and violence, cut down many of the poles and destroyed much of the cable and wires stretched thereon, and had put the light and power company out of business and disabled it so that it could not exercise its franchise or carry on its operations. It averred that the said defendants did thus destroy the subject-matter of the suit, knowing that this appeal

was pending and that this court had not lost control over the controversy, and that no mandate had issued and could not issue under the rules. * * *

"The respondents have moved to discharge the rule, because the petition fails to show that they have in any way violated any injunction, rule, order, or mandate of this court. This is bottomed, first, upon the claim that the injunction, which was continued pending the appeal to this court, is the injunction of the circuit court, and that any violation is cognizable only in the circuit court; and second, upon the claim that if that be so, that the petition fails to show any facts which constitute a contempt of this court. * * *

"It does not necessarily follow that disobedience of such an injunction, intended only to preserve the status quo pending an appeal, may not be regarded as a contempt of the appellate jurisdiction of this court, which might be rendered nugatory by conduct calculated to remove the subject-matter of the appeal beyond its control, or by its destruction. This we need not decide, since, *irrespective of any such injunction actually issued, the wilful removal beyond the reach of the court of the subject-matter of the litigation, or its destruction pending an appeal from a decree praying, among other things, an injunction to prevent such removal or destruction until the right shall be determined, is, in and of itself, a contempt of the appellate jurisdiction of this court. * * * Unless this be so, a reversal of the decree would be but a barren victory, since the very result would have been brought about by the lawless act of the defendants which it was the object of the suit to prevent. * * **"

There is little, if any, distinction in principle between that case and this one. In the Merrimack Bank case the Supreme Court had dismissed an appeal, and at the time of the destruction of the subject-matter of the litigation, there was nothing whatever pending before the Supreme Court. The time for filing a petition for a rehearing had not expired, but such petition had not been filed. It later was filed. In the instant case, the motion to modify the judgment had been filed and actually was

pending at the time of the removal of the subject-matter of the litigation beyond the jurisdiction of the Court below. In that respect, this case is stronger than the Merrimack Bank case, and the conduct of the appellees was more flagrantly in violation of the Court's authority than was the action of the respondents in the Merrimack Bank case.

Wartman v. Wartman, *supra*, involved a defendant who had parted with an alleged trust fund in his custody pending an application for an order requiring him to pay the money into Court. He was held to be in contempt. Chief Justice Taney, in the opinion, said:

"A final decree would be idle and nugatory, if, pending the litigation, a fraudulent trustee was left at liberty to waste or misapply the trust property, or place it beyond the reach of the process of the court."

In the Bessette v. Conkey case, hereinbefore cited, after holding that "The power to punish for contempt is inherent in all courts" the Supreme Court held that one not a party to a suit might be adjudged in contempt for violating an injunction, and stated that

"The purpose of contempt proceedings is to uphold the power of the court, and also to secure to suitors therein the rights by it awarded."

The following appears in the decision of the Supreme Court in Lamb v. Cramer, already cited in this brief:

"The court below rightly held that, upon the facts presented by the petition, proceedings might be had against Lamb, either by bill in equity, as was done by the supplemental bill filed by the receiver in Lamb v. Scmitt * * * or by contempt proceedings as in the present case, or by both, to compel restoration of the diverted property to the custody of the court. The petitioner, as counsel in the principal suit, had notice of the equities alleged in the bill. So far as he acquired, *pendente lite*, any interest in the property involved in the suit, he was not only subject to those equities, but bound by any decree which the court might make with respect to it, to the extent that it

might adjudicate the rights of plaintiffs against defendants. * * * The provision in the decree that it should be without prejudice to the rights of Lamb postponed until further order of the court the adjudication of his rights, but did not forestall it. His receipt and diversion of the property, which was then *in gremio legis* * * * tended to defeat any decree which the court *might* ultimately make in the case. That and his retention of the property after the decree was entered were in fraud of the rights of the plaintiffs to prosecute the suit to its conclusion, and *an obstruction of justice constituting a contempt of court*, which might be proceeded against civilly. * * * (Italics supplied.)

Appellees had no right to assume that the Court, in acting on the motion filed by appellant, would refuse to modify the judgment in this case. They were, under the decided cases, guilty of contempt and should be dealt with accordingly.

Power of Court to Modify Judgment.

Rule 60(a), Federal Rules of Civil Procedure, under the heading "Relief from Judgment or Order", provides:

"Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. * * *

Subdivision (b) of the same rule relates to relief from judgments on other grounds, and provides that

"Writs of *coram nobis*, *coram vobis*, *audita querela*, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

Rule 6(c), Federal Rules of Civil Procedure, provides:

"The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a

term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it."

At common law, jurisdiction over a cause ceased with the expiration of the term at which a final judgment was rendered, and thereafter the Court had no power to correct, amend, open or vacate a judgment.

U. S. v. Mayes, 235 U. S. 55, 35 S. Ct. 16, 59 L. Ed. 129.

Where terms of Court have been abolished, and the Court is deemed to be continuously in session, the general rule of control during the term has no application.

State v. Fergus County Tenth Judicial District Court, 55 Mont. 602, 179 P. 831.

Statutory provisions govern all such cases falling within their provisions.

Doty v. Rigour, 9 Oh. St. 519.

Poe v. Temple, 103 Calif. 447, 37 P. 414.

Since the Federal Rules of Civil Procedure have the force and effect of statutes, they govern the modification of judgments in this jurisdiction, and the Court below properly could, and should, have modified the judgment in this case in accordance with appellant's motion.

All classes and kinds of judgments may be amended or vacated.

Aetna Life Ins. Co. v. McCormick, 20 Wisc. 265, 268.

Williams v. Merritt, 109 Ga. 217, 219, 34 S. E. 1012.

Clearly, appellant's motion to modify the judgment in this case to make it conform to the settlement agreement of May 2, 1945, was well founded and meritorious, and the Court below had authority and power to modify its judg-

ment. The actions of appellees in anticipating the decision of the Court on the motion and making impossible the performance of its mandate if modification of its judgment had been ordered are a flagrant defiance of the Court's power and authority and are contemptuous.

In the statement of points the words "prejudicial error" below are used. Juridically speaking, there was such error, but no one can read the record without being convinced that the experienced and able jurist below realized that in the complete absence of any reply, answer or even explanation of appellant's sworn charges and unequivocal statements, a judgment of conviction of contempt was inevitable. He recessed Court to allow the appellees to put in some defense by affidavit or sworn testimony (App. 30, R. 119). Because of the implication of such conviction to two experienced members of the bar, it is reasonable to assume that he shrank from such drastic action, as had appellant and his counsel, as indicated by their statements to the Court below (App. 17, 18, 34, R. 55, 128).

Happily, there seemed a *tertium quod* in the incident of further funds having been deposited in the registry of the Court below by the United States Treasury, which fact had been drawn to the attention of the Court by appellant and his counsel in the very hope that this would afford a way out for the appellee and her attorneys, one of whom appeared to be contrite and willing to make *amende honorable*, as shown by his statement (App. 30-34, R. 67, 69, 70, 72, 121, 122, 188). The Court below was misled, as, indeed, was the appellant (App. 34, R. 127).

No sooner had these appellees thus escaped inevitable conviction, which all laws and precedents demanded, than they answered appellant's counterclaim by asserting again the frivolous contentions they had been permitted to urge *ad lit* on the contempt motion (R. 242-245).

They have now added to their contumacious conduct deliberate deceit and duplicity, in sneering contempt of the mercy shown them by the Court below, and the appellant still awaits the receipt of a single dollar on account of disbursements incurred and services rendered since 1928. In his effort to avoid adjudication in contempt, counsel referred to above attempted to deceive the Court below by stating that the motion to modify the original judgment was served on him on July 2, 1948, when the record shows, and he knew, that it was served on the morning of July 1, 1948, and filed the same day (App. 25-27, 28, 36, 43, 44, R. 112, 114, 115, 116, 157, 165).

Conclusion.

From the facts in this case and the law applicable thereto, the order of the lower Court denying appellant's motion to adjudge appellees in contempt and to require them to restore funds to the registry of the Court below clearly is erroneous and should be reversed, and this cause remanded to the lower Court with directions to enter an order adjudging appellees in contempt of Court and directing them to restore the funds withdrawn to the registry of the court, failing which they should be suitable punished.

Respectfully submitted,

HAROLD G. ARON

AND

RICHARD L. MERRICK,

Attorneys for Appellant.

APPENDIX

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APPELLANT'S APPENDIX

Case No. 10,288

The following matters came on regularly for hearing on this, the 14th day of March, 1949, before the Honorable Ben Moore, United States District Judge, of Charleston, West Virginia, sitting as a Visiting Judge:

* * *

3. Motion by Aron, Defendant No. 2, to adjudge Plaintiff in contempt.

* * *

3 Appearances:

Bernard J. Gallagher and Daniel J. Anderson, Esqs., Attorneys at Law, of Washington, D. C. for Plaintiff.

* * *

Harold G. Aron, Esq., Attorney at Law, of New York, N. Y., appeared as Defendant No. 2, and as his own Associate Counsel.

Richard L. Merrick, Esq., Attorney at Law, of Washington, D. C., appeared for defendant, Harold G. Aron.

* * *

9 Mr. Gallagher:

* * *

- 11 Later, in 1939 or 1940, Mr. Aron procured the introduction of a Bill in Congress for her relief, the purpose of which would be—the result of which actually was, because it became Private Law 509 passed in 1940 and it provided—directed the Secretary of the Treasury to pay to her out of the German Special Deposit Account in the hands of the Treasurer the sum of \$160,000.00 with interest at five (5) percent from 1920 as if an additional award had been made in her favor. That Bill, as I said,

was approved in 1940, so in August of 1940 there became due her under that Private Law 509 the sum of approximately \$160,000.00.

* * *

15 While that motion was pending and undecided by
 Judge Schweinhaut, we filed another motion to ap-
 16 prove a, what has been called "settlement agree-
 ment" dated May 2, 1945 and which I have here that
 was in the form of a letter from Mrs. Drier to Mr. Aron
 and the purpose of it was to make provision for the disposi-
 tion of the \$54,000.00 which then lay in the registry of the
 court. The settlement agreement of May 2, 1945 provided
 that that \$54,000.00 should be disposed of in this way:
 It says "The fund now deposited in the registry of the
 court is to be used by me (meaning Mrs. Drier, she direct-
 ing the letter to Mr. Aron) in the following manner: One-
 third thereof I shall retain and make use of for my per-
 sonal needs and requirements as I see fit." So, as to that
 third, it was to be delivered to Mrs. Drier without any
 strings attached.

 Now, speaking of the second one-third, the agreement
 says this: "One-third thereof I shall use to buy up claims
 against you on the part of those who have intervened in
 the pending suit, or such other claims you may designate,
 including claims of your wife and sister-in-law for moneys
 advanced to you since 1940, all in such amounts as shall
 be designated by you or by the Court."

 Now that third still lies in the registry of the court, it is
 still there.

 "The remaining one-third is to be treated as a reserve
 to permit the prosecution of my claim and for my mainte-
 nance." The claim she is speaking about is collec-
 17 tion of the balance due on these awards. "You,
 (Mr. Aron) are to be entitled to draw against it for
 out-of-pocket disbursements made by you on my behalf

with my prior approval and each of us is permitted to draw the sum of \$300.00 a month, such drawings to be treated as an advance or loan to be taken into account in the general or final accounting.”

* * *

There was a motion filed with the Court to which was attached a copy of this letter of May 2, 1945, this so-called “settlement agreement” and that was considered by Judge Schweinhaut at the same time he acted on our motion for summary judgment. He made an order, dated November 15, 1946, which says that it is—after the preliminaries, referring to the argument, so on—“it is adjudged, ordered and decreed (1) plaintiff’s motion for summary judgment is granted; (2) the settlement agreement of May 2, 1945 between plaintiff and Harold G. Aron is approved. The Clerk of this Court is hereby ordered and directed to pay plaintiff Drier and to Bernard J. Gallagher her attorney, jointly, the sum of \$36,331.55 less the Clerk’s fee incident thereto, being two-thirds of the funds deposited in the registry of this defendant, Henry Morgenthau, Jr., Secretary of the Treasury, the balance of the funds, \$18,165.77 is to remain in the registry of this Court pending further order of this Court. The matter of determination of the interests, if any, of the other parties in this case to the balance of the funds, \$18,165.77, is hereby referred to the Auditor of this Court who is directed to make his findings and report thereon to the Court. The claims of the parties who have intervened, except insofar as their interests may appear in connection with the settlement-agreement of May 2, 1945, are hereby denied.”

* * *

24 Now, of course, in addition to those two sums—and I will identify them in a minute—there still remains \$18,000.00—Drier has no claim to that; that is there

for the Auditor to determine which of these intervenors, interpleaders, have the right to it. The two sums that have been paid out, \$27,000.00 (in round numbers) and
 25 \$11,000.00 (also in round numbers) they represent, as the Orders of the United States Attorney paying the money into court will show they represent moneys now payable on account of the awards mentioned in the answer and counterclaim of the defendant, Morgenthau, and on account of Private Law 509 mentioned in said answer and counterclaim. So there will be no question the funds now there are exactly the same sort of funds as the original \$54,000.00.

Now those funds arose in this way:

Your Honor probably will recall that Settlement of War Claims Act of 1928 established certain categories under which these awards of the Mixed Claims Commission were to be paid; awards in certain amounts were paid in full and others paid pro rata and, after categories in favor of American claimants were exhausted, then German Nationals came in for payment of their claims. Because of—I suppose, because of the second war and because of the complete default by Germany of its obligations to the United States and to the rest of the world, Congress here last summer passed Public Law 375 which is to change the order of priority for payment out of the German Special Deposit Account and for other purposes.

I will read the Preface:

26 “Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

“Section 4(b) of the Settlement of War Claims Act of 1928 (that is the section that provides these categories) as amended * * *

The language of this Act, the effect of which is to rearrange the categories so the German Nationals don't take the

money that is in the German Special Deposit Account, the categories are reshuffled so the Americans can have those funds and German Nationals don't get them. That is the effect of that law.

Under that, two payments of \$27,000.00 and \$11,000.00 became due under Private Law 509 and they have been paid into the registry of the court.

Now if Mr. Aron contends—and his amended counterclaim in this case—well, his counterclaim in this case which he has filed motion for leave to file claims that he is entitled to 30 percent of the \$11,000.00 and of the \$27,000.00 which have been paid in, presumably in payment for services rendered and could be only for services passed in Private Law 375 (that is the way the funds arose, through this action of Congress)—if his contention is services *re* 375, he is right back under prohibition against contracts for the procurement of the passage of “favor legislation” because our Court of Appeals in the case of Brown against Gesellschaft Fur Drahtlose Telegraphie (this
27 was the second of the two cases. * * *

28 The Court: What is it Mr. Aron was to calculate his 30 percent on, for anything he afterwards collected?

Mr. Gallagher: All I can do, your Honor, is to read the language of the paper to you:

“It is also understood—” now wait, let me start at the beginning. This is Mrs. Drier’s letter to Mr. Aron:

“Dear Mr. Aron: It is my desire that you resume your representation of me in collecting balances due on awards of the Mixed Claims Commission and Private Law No. 509, aggregating approximately \$350,000.00. I understand that you will not represent me in any other matters.”

Then follows a description of his employment.

Then on top of Page 2 is the description of his compensation. It simply says:

“It is also understood that on all future amounts recovered on these awards and under Private Law No. 509, or on any future awards, you are to receive thirty percent (30%) in full for your services and that this percentage is to be based upon the amount actually received, whether the same is designated as
 29 principal or interest, and by whatever means recovered, including, but not limiting the same by litigation, general or special legislation, negotiation, or by diplomatic settlement.”

The Court: Is it your position nothing could ever be collected by Mr. Aron under that 30 percent agreement?

Mr. Gallagher: The Court did hold, in this case, that any contract for the procurement of “favor legislation” is—let me get the language—“since the Private Law was ‘favor legislation’ no fee can be recovered for procuring it.”

The Court: Well, suppose that Mr. Aron didn’t have anything whatsoever to do with the procuring of this Private Law, which is an amendment to 509 or 549, whatever it is?

Mr. Gallagher: This is not an amendment to 509.

The Court: I thought you said—?

Mr. Gallagher: (Interrupting) —amendment to Settlement of War Claims Act of 1928.

The Court: You say that it is “favor legislation.”

What I am asking is, suppose Mr. Aron had nothing to do with the passage of that but nevertheless under that law he is able to collect for his client \$38,000.00, then can he get 30 percent of it?

30 Mr. Gallagher: He can’t get anything out of the proceeds of the Private Law or amendment of the Settlement of War Claims Act.

The Court: I am supposing that he hasn’t done anything with reference to the passage of that law; therefore he is not being paid to secure that, but he is possessed of

a contract back in 1945 which says anything that he collects from awards he shall have 30 percent of them. Now would that be valid in order to enable him to collect 30 per cent of the \$38,000.00, under those circumstances? And if not, why not?

Mr. Gallagher: If he had performed services which were not services of the prohibited type and which services resulted in the creation of a fund for her benefit, I would say he is entitled to a fee—but that is not the case here. You see the money that is in the registry of the court, this \$27,000.00 and \$11,000.00, it only became possible for Mrs. Drier to get that through this amendment of Settlement of War Claims Act, an Act passed by Congress and what I say is, there were no other services rendered. This is it. This is what caused the money to come into being.

Now what I say in connection with that is, this amendment of the Settlement of War Claims Act, which was a pure “favor” by Congress to benefit American
31 awardholders in preference to sending awards home to Germans—“favor legislation”—if Mr. Aron had anything to do with the passage of that, he is under the Brown cases; if he had rendered services independent of that \$27,000.00 and \$11,000.00—

The Court: (Interrupting) What does he claim in that respect?

Mr. Gallagher: He simply says he rendered services, he wants 30 percent of the \$27,000.00 and 30 percent of the \$11,000.00. He does not say what the services were.

Now, rather than prolong this, I want to be sure I have got that point over to the Court, that is where this money came from: through this gratuity by Congress in favor of American Awardholders. Our Court of Appeals says Settlement of War Claims Act is “favor legislation”; this amendment can be no less “favor legislation”, even though Mr. Aron was instrumental in passing it through Congress.

38 Mr. Aron: Your Honor, taking up where we
left off yesterday: In order that I shall not appear
before the Court as merely an irresponsible defaulting
debtor, may I claim that the loan of the Morris Plan Bank
arose in this manner: during the long history in
39 which I was trying to force the German government
to account for Mrs. Drier, I borrowed for her ac-
count \$20,000.00, at the Morris Plan Bank. That was paid.
At the time it was paid, there was a further amount
(\$3,000.00) owing which I had borrowed for her account
while she was stranded abroad; she not being here, I had
executed the note and protected the Morris Plan Bank as
best I could under the conditions, and that is the basis of
their claim for \$3,000.00.

As to the claims represented by Mr. Nicholson, to whom
Mr. Merrick referred, two department stores in New York,
that indebtedness arose from the fact that my divorced
wife, after I was separated from her and for whom I no
longer had any legal responsibility, continued to use my
credit and, as a matter of honour, I assumed the obliga-
tions and told them to enter judgments against me in order
to protect themselves.

As to the position of the Great Lakes Steel Corporation,
that is quite amazing in three ways: in the first place, I
am on the friendliest terms with officers of that company.
My liability arose with them when we ventured on a project,
the Strand Steel Corporation, building small houses
in the City of New York and because of terrific labor re-
sistance, this operation was not successful but I assumed
that and when my first wife secured sequestration
40 (since found utterly void by the Supreme Court) I
said to them, and voluntarily urged them to enter
the judgment.

Now the amazing thing is that after we made a settle-
ment agreement, between myself and Mrs. Drier in 1945,

it was provided, as I shall point out to you, that it was to be submitted to the New York Court for approval, as the expeditious way of getting the matter settled and, if I failed to get that approval, then she was to move for approval. Here, to my amazement, in the New York Court my divorced wife appeared by the attorneys of the Great Lakes Steel Corporation and then, they then and there defeated my effort to have this settlement approved by which I would have been put in a position to meet my obligations and since then, in this very motion which we have before your Honor, as a result of the abstraction of \$31,000.00 from the funds in the registry of the court, the Great Lakes counsel appears here in defense of Mrs. Drier's attorneys and says there is nothing in their conduct reprehensible, although their conduct results in taking funds out of the trust fund and which would have inured to the Great Lakes Steel Corporation finally.

If your Honor analyzes the Opinion of Judge Schweinhaut, approved by the Court of Appeals, certiorari denied in the Supreme Court, you will find the Great Lakes Steel

Corporation is expressly barred by his decision
41 from any part in this fund in the court. So much for that.

Now, I think it would be well to get straight—if I am able to be of help in that direction—on the law of the case. Mr. Gallagher has laid great weight upon, and waved it before your Honor, the decision of the United States Court of Appeals here in the Gesellschaft case. I happen to have more than a passing knowledge of the history of the Settlement of War Claims Act and the litigation which has arisen from it since then.

Now in his argument, Mr. Gallagher read part of the decision. In his motion papers, if your Honor please, I call your attention to this: twice he states as a quotation from that Opinion “* * * but he has no valid claim inde-

pendent of the 1945 agreement; meaning of course, any valid rights which the 1945 agreement gave him upon the deposited fund; since the Private Law was 'favor legislation' no fee can be recovered for procuring it."

In that purported quotation from the Opinion of the Supreme Court of Appeals, twice in Mr. Gallagher's motion papers within the "quotes" and nothing to indicate it is other than a part of the Opinion, he has added these words "meaning of course any valid rights which the 1945 agreement gave him."

Now, as to the Gesellschaft case: against that decision in this Circuit can be lined up numerous decisions
42 and I don't say that the Court of Appeals was wrong, if your Honor please. It simply has no bearing upon this case but in order to avoid confusion, let me explain the distinction:

In the Gesellschaft case, a very reputable firm of New York lawyers represented some Germans seeking to recover seized enemy property. They moved under the guise of being a Swiss corporation. The New York firm succeeded. The recovery was very large, ran into millions of dollars. Thereupon, the defendants declined to pay upon the ground it was a contract against public policy and the Court of Appeals sustained it but, your Honor, in its Opinion it denounced the morality and treachery of the defendants in that action and that, precisely, is the one position which Mr. Gallagher seems to take.

But in that case, if your Honor please, the German Nationals had no possible right or claim to the recovery of that property. It was a pure act of grace on the part of the United States Congress and they were seeking pure "favor legislation."

Now in the decisions, and probably the leading decision is the Textile Mills Corporation case, decided by special statutory court some four, five years ago, the distinction

is made between "favor legislation" and "debt legis-
 43 lation" where the claimant has no moral, legal or
 other claims to the relief asked. That is "favor
 legislation" but where the claimant has a legal or moral
 claim for an obligation or a contract or agreement unper-
 formed, that is called "debt legislation" and does not fall
 within the indictment of being against public policy.

Now in the Drier case, what happened is this: She had
 a claim against the German government for the loss of her
 husband's estate which had come to her upon his death
 and incidentally yesterday (I handled the entire matter)
 I heard a distinction, difference between claim for furnish-
 ings and claim for the land.

Anyway, she agreed (through her American lawyers in
 Berlin) to accept \$48,000.00 as indemnity at the time and
 before the American Agent of the Mixed Claims Commis-
 sion, who was then in Berlin, then later a Washington
 lawyer of some prominence but not familiar with Inter-
 national Law, came to me and asked me to undertake on
 her behalf an increase in the award, in which I was suc-
 cessful and procured an additional award of \$250,000.00
 with accumulated interest which ran, together, in the
 neighborhood of \$400,000.00 or \$500,000.00 and that, if your
 Honor please, is enforcing obligation of the German
 government under its Treaty to American Nationals for
 private war losses which were recognized and given a legal
 status. I pursued the matter further and got her
 44 an additional award of \$160,000.00 which with ac-
 cumulated interest ran around \$400,000.00.

So, all-in-all, recovery came to a million dollars.

Now as to the services before the Congress—before the
 Mixed Claims Commission: I negotiated with the German
 Agent and we finally came to an agreement that Germany
 would pay \$160,000.00 additional; that was all formalized,
 your Honor please, and an award was about to be entered

when the German Foreign Office, with typical Nazi duplicity, declined to confirm—didn't deny the agreement—simply would not confirm it and permit the award to be entered.

I was then driven to seek Congressional action in order to enforce her claim and I was fortunate enough to establish a new principle of International Law, recognized unanimously by the Congress and approved by the President of the United States, Mr. Roosevelt, under which she did receive the \$160,000.00.

Now, throughout, as your Honor will observe, she was pursuing a remedy for the enforcement of a legal claim; she was not seeking "favor legislation" and was driven into legislation because it was the forum open to her and your Honor is quite familiar, as I am aware from your commentary on the Federal Tort Claims Act that there are still cases where the only tribunal for the enforcement of a

debt is the Congress of the United States and it is
45 common knowledge, if you consult the Judiciary

Committee of the House and Senate records, there are hundreds and thousands of claims before those committees, because there is no forum, but, that is not "favor legislation" and that distinction runs throughout the decided cases on this subject.

Now as to this specific matter: Settlement of War Claims Act—claimants who had suffered millions of dollars of damages, so-called sabotage claims, pursued their claims and fees ran into millions of dollars; in the case of the Lehigh Valley Railroad, the fee only ran over a million and a half dollars and the stockholders and directors of that company took the matter into court, on the ground that the services of their counsel was "favor", was seeking "favor legislation" and "lobbying" and were defeated;

• • •

My adversary could find no place where the doctrine of the Gesellschaft case applied, except coming before the Con-

gress with no right in the world and says "Please do something for us."

* * *

46 In 1941 Mrs. Drier insisted that as to some of her matters I take certain action which I, as a self-respecting lawyer, was unwilling to take and I was discharged. I, thereupon, brought suit against her for some twenty years' services. A most elaborate and detailed bill of particulars is filed in the record of this Court—services in which I had incurred an expenditure of \$25,000.00 out of my own pocket. I kept her out of prison in Czechoslovakia and Germany.

I filed that action and was met with the defense my employment was "lobbying" a "lobbying contract" and I could not recover. That litigation dragged for years and in 1945 (and I think your Honor will see the relevancy of the point) in 1945 Mrs. Drier's son came to me imploring me to re-enter the matter, that he and his wife and child were starving to death and his mother was destitute and I said I would consider it under a limited retainer, where I had nothing to do with Mrs. Drier except in the pursuit of this single matter. Mr. Gallagher was then representing

Mrs. Drier. She was brought to my office with her son
47 and the entire morning was spent in arriving at a basis on which I would agree to go forward with the matter.

Mr. Gallagher has been very careful to read only parts of the letter and if your Honor will bear with me I should like to read the entire letter, dated May 2, 1945. "Dear Mr. Aron:" It is signed by "Katherine M. Drier" and witnessed by her son, the "Baron George Rosenberg-dLaMare."

Mrs. Drier is writing to me:

"It is my desire that you resume your representation of me in collecting balances due on awards of the

Mixed Claims Commission and Private Law No. 509, aggregating approximately \$350,000.00. I understand that you will not represent me in any other matters.

“As to pending litigation between us, (my pursuit for \$250,000.00) it is my understanding that you are agreeable to this being discontinued by both of us with the understanding that it will be without prejudice to the rights of either of us against the other as such rights may now exist.

48 “Upon such discontinuance it will be stipulated that all questions as to amounts now due to and from either of us, and for money received and disbursed by you for my account, will be determined by a certified accountant upon whom we will mutually agree, and the costs of such accounting are to be shared equally by both of us; that your claims for sundry services shall be evaluated and determined by arbitration, each of us naming one arbitrator, and the arbitrators so named selecting a third if they do not agree.

“It is also understood that on all future amounts recovered on these awards and under Private Law No. 509, or on any future awards, you are to receive thirty percent (30%) in full for your services and that this percentage is to be based upon the amount actually received, whether the same is designated as principle or interest, and by whatever means recovered, including, but not limiting the same by litigation, general or special legislation, negotiation or by diplomatic settlement. It is also understood that this percentage shall be reduced to fifteen per cent (15%) in the event of your death or disability before a recovery is actually made. However, this agreement will be binding upon my personal representatives, heirs, etc., in the event of my death within this period.

49 "The fund now deposited in the Registry of the
 United States District Court for the District of
 Columbia is to be treated * * *"—you have heard that
 repeatedly but you have not heard the concluding para-
 graph:

"It is further agreed that if I am not able to procure
 the money now in the Registry of the District Court
 within six months from this date I shall have the right
 to proceed with my pending action against the Secre-
 tary of the Treasury for the release of the funds now
 deposited with the Court upon the understanding that
 if I succeed therein the money which I recover shall be
 disposed of as above provided and that you will, on
 the terms and conditions stated herein, continue to act
 for me in the recovery of what is still due to me."

"Should the terms of the present agreement at any
 time give rise to any divergence of opinion between us
 it is agreed that the question shall be settled by arbitra-
 tion in the same manner as provided above."

* * *

51 So then, if your Honor please, as to whether this
 is "favor legislation" and as to whether I have
 52 rendered services: I will pass now to another phase
 of the case.

Mr. Gallagher stated that Judge Schweinhaut—and, by
 the way, are they "Judges" in this Court? Justices or
 Judges?

The Court: (Interrupting) "Judges, under the new
 Judicial—

Mr. Aron: (Interrupting and continuing)—that Judge
 Schweinhaut had passed upon this matter. Well, let me tell
 you of Judge Schweinhaut's connection with it:—

The original agreement was presented to him for ap-
 proval, I having failed to get the approval in New York and
 Judge Schweinhaut approved the agreement. When the

agreement was negotiated in May 1945 it was agreed that the money in the Registry of the Court was to be paid to Mr. Galloway, Herman J. Galloway, who was then my attorney, as my attorney and to Mr. Gallagher as Mrs. Drier's attorney, was to be paid jointly to them. In other words, when disbursed by the Registry of the Court it was to go to the order of them, the two of them holding it in trust for the purposes of carrying out the 1945 agreement which your Honor will recall had a continuing basis, would run probably over three years.

When the matter was brought before the Court Mr. Gallagher prepared the motion papers and if your Honor consults the motion papers you will find in the papers
 53 Mr. Gallagher prepared he moves the Court that the moneys in the Registry of the Court be paid to him and Mr. Galloway, jointly—in his own motion. The matter came on before Judge Schweinhaut and at that time Mr. Galloway was called upon—he was unable to appear and Mr. Merrick stepped in the case at the last moment—but he was unfamiliar with it. Judge Schweinhaut decided the case and in the Order, if the Court please, signed by Judge Schweinhaut on a motion that the money be paid to Mr. Galloway and Mr. Gallagher, jointly, the order prepared by Mr. Gallagher and signed by Judge Schweinhaut, without Mr. Merrick knowing its significance, it provided that the money should be paid to Mrs. Drier and Mr. Gallagher as her attorney, not to Mr. Gallagher and Mr. Galloway, jointly.

After the decision of the United States Supreme Court, or about that time, Mr. Gallagher remarked to me that he was under heavy pressure by Mrs. Drier who had brought in a new attorney who was on his neck enforcing action and that he, Gallagher, had some apprehensions about his ability to resist paying the money over to her.

As soon as the Supreme Court handed down its denial, the application for Writ of Certiorari, the very day I telegraphed to Mr. Gallagher from my farm in Connecticut as follows: this is dated June 26, 1948.

54 "Merrick just called. Do nothing until I arrive Wednesday. Signed agreement provides money payable to you and Galloway—"

No, that was wrong. The oral agreement provided it was to be paid to him, it didn't get into the written letter but it was in the motion papers which Mr. Gallagher had prepared and submitted.

(Continuing) "I have agreed to no change. For your protection ascertain client's condition and status. I am sure you will not act without my consent or court order. Otherwise, I shall have to hold you personally responsible."

Immediately on arriving—that was sent on Sunday, and arriving here on Wednesday, I called Mr. Gallagher. Mr. Gallagher repeated that these people were on his neck and there wasn't anything he could do about it. He would have to give this woman the money, unless I could serve some kind of a legal paper on him which would give him an excuse and a reason for not doing so. Immediately I called Mr. Merrick and with Mr. Merrick's usual diligence and care, the very next morning at ten o'clock such papers were served on Mr. Gallagher.

* * *

55 Mr. Merrick: May it please the Court, filing a contempt proceedings against fellow-lawyers is an unpleasant thing. In fact, this has been one of the, if not the most unpleasant experiences in my history, my career as a Member of the Bar. My religion admonishes me to forgive and forget. The canons of the American Bar Association provide that it is the duty of a lawyer to vigorously

expose and prosecute, if necessary, the shortcomings of his fellow attorneys. My client insists that we go forward with this proceedings. So your Honor can see that I have been laboring under difficulties. My duty to my client, of course, is paramount and I ask your Honor to indulge me if I should become a little bit excited in my remarks and my argument because, at times, I do become carried away in advocating my clients' causes.

* * *

56 On June 30, 1948 I also, talked with Mr. Gallagher on the telephone and received somewhat the same explanation that Mr. Aron has related to your Honor. That afternoon I talked also with Mr. Aron and, as he has stated, I prepared a motion which I served on Counsel the next morning, July 1, 1948 at about 10:15 a.m. That motion was one to modify the original judgment in this case, entered on November 15, 1946, to make it carry out the understanding and the agreement, oral agreement which had been made between Mr. Aron and Mrs. Drier, as I understand it with Mr. Gallagher present all the time during the negotiations leading up to the May 2, 1945 contract, that the funds would be paid to Mr. Gallagher and Mr. Galloway as trustees. That motion was served in the offices of Mr. Gallagher and Mr. Hendry, who is associate counsel in the case, on the morning of July 1, 1948. When I brought the paper in to serve it, Mr. Gallagher told me that the funds had already been received and paid out and Mr. Hendry repeated the same thing. I said "Well, I will leave the motion, anyway."

While I was there, Mrs. Drier came in and I was introduced to her; I had not met the lady previously. Mr. Gallagher again repeated the statement that the
57 funds had been received and paid out.

About a month later, Mr. Aron and I went to the Treasury Department and while there we inquired about

the payment of this fund of \$31,000.00 to Mr. Gallagher and Mrs. Drier on June 30, 1948 and we were advised that that check was not cleared through the Treasury until July 2, 1948 and was presented by a messenger from the Union Trust Company and the funds turned over to him.

In order, therefore, to get at the truth of the matter I took the deposition of Norman Glasgow, Assistant Treasurer of the Union Trust Company, where Mr. Gallagher has his account and he testified, as your Honor will see by reading his deposition, that the funds were deposited in the Union Trust Company in Mr. Gallagher's account, "Special Account" on July 2nd, and were not withdrawn therefrom until July 6, 1948. So that the information given to me on July 1st wasn't the truth.

I also took the deposition of Mr. Hendry, Mr. Gallagher's associate, in order to attempt to find out what representations were made to Judge Schweinhaut on June 30th when the Order to withdraw the funds was signed by him. Mr. Hendry's memory was quite convenient: he could not recall who went down to the Court to get the check, stated that he had collaborated with Mr. Gallagher in the preparation of the Order which was presented to his Honor,
58 Judge Schweinhaut;

* * *

he testified that he went down and got the check and brought it back and put it in the safe; he could not recall, what had happened to the check after that he did not know; he said he did not take it out and he did not know what part of the Order he, himself, had prepared or who dictated it.

I also took the deposition of Judge Schweinhaut in order to determine what, if any, representations had been made to him in procuring the Order of June 30, 1948, as to why other counsel, including myself and some eight other lawyers in the case, had not been notified of the presentation of that Order.

I want to go back a minute and say that on June 30th Mr. Gallagher told me that no additional Order had been procured, none was necessary and, I think, he told the same thing to Mr. Aron.

Now, Judge Schweinhaut testified that he could not remember what had occurred on June 30th.

* * *

62 This case was filed on April 16, 1943 by Mrs. Drier against the Secretary of the Treasury, then Mr. Morgenthau. On July 27, 1943 the Secretary of the Treasury filed an interpleader and paid into the Court \$54,497.32 and interpleaded Mr. Aron as "Defendant No. 2" and a number of other parties who have been mentioned and I think need not be repeated to your Honor now. That interpleader was followed by Mr. Gallagher filing a motion, his first motion, on December 18, 1944 for a summary judgment.

* * *

63 Negotiations were had towards a settlement, even after I came into the picture, but on May 2, 1945, as Mr. Aron has stated, this agreement which he has read to you was entered into. I am informed that Mr. Gallagher represented Mrs. Drier in the negotiation of that agreement. Following that, on April 10, 1946 Mr. Gallagher, on behalf of his client, filed a second motion for summary judgment and following Mr. Aron's failure to get the approval of the Court in New York, on September 12, 1945 he filed a motion to approve that settlement agreement and he appended to his motion papers an affidavit prepared by him for Mr. Aron's signature and an affidavit prepared by him for the signature of his own client, Mrs. Drier.

Now in the Aron affidavit, the following appears:

"A dispute arose between Katherine Von Rosenberg Drier and me over the amount of fee due me for services rendered. We have now composed our dif-

ferences and have agreed upon a settlement to be made out of the funds which have been paid in the Registry of this Court. * * *

64 “Copy of the settlement agreement is attached to this affidavit. I respectfully request the Court to approve settlement set out in that agreement.”

In the affidavit prepared for Mrs. Drier and filed this appears:

“A dispute arose between Mr. Aron and me over the amount of fee due him for services rendered. We have now composed our differences and have agreed upon a settlement to be made out of the funds which have been paid in the Registry of this Court. * * *

“Copy of the settlement agreement is attached to the affidavit of Mr. Aron herein. It bears his signature and mine. I respectfully request the Court to approve the settlement set out in that agreement.”

In the motion papers which Mr. Gallagher prepared and filed on behalf of his client—in the motion, itself, he says this:

65 “Now comes the plaintiff, Katherine M. Drier through her attorney and moves that the Court approve the settlement of the above-entitled action between the plaintiff, Katherine M. Drier and Harold G. Aron and direct the Clerk of the Court to pay the fund of \$54,497.32 now deposited in the Registry of this Court to Bernard J. Gallagher and Herman J. Galloway as attorneys, respectively, for Katherine M. Drier and Harold G. Aron for disbursement by them in accordance with the agreement of settlement made between Katherine M. Drier and Harold G. Aron.”

The settlement agreement was the one of May 2nd.

Now in the points and authorities, or rather memorandum in support of that motion he made the same state-

ments and the same request that the money be paid to Mr. Galloway and himself for disbursement in accordance with the agreement. On six different occasions reference has been made by Mr. Gallagher to that agreement of May 2nd and it has been recognized by him and he has insisted that it be approved.

* * *

66 Then, in his brief in the Court of Appeals, he again refers to the same "settlement agreement" and says:

67 "Since we have shown herein that there was no absolute valid assignment or lien in favor of the appellant (that was Mrs. Ritchie) created either by the alleged assignment to McLean or Drier assignment to Aron, we submit that the original parties, Aron and Drier, were at liberty to compromise or compose their differences upon any term agreeable to them and the Court below was justified in approving it."

Or words to that effect.

Now having, on six occasions, advocated the approval of this agreement and having reaped the benefits of its approval, it seems to me now that the plaintiff is estopped to deny that that was a valid agreement.

Now on the question of the summary judgment motion which is pending before your Honor: there are two of them in fact, one as to the \$27,000.00 and a supplemental one asking that it be enlarged to include the \$11,000.00 paid in the Registry of the Court February 15, 1948, but the situation is not the same as it was when the motion for summary judgment relating to the \$54,000.00 was before the Court because Mr. Aron claims in his affidavit, which is not denied by any paper filed by the plaintiff or on her behalf, that he has rendered services and the Courts have

held where there is a dispute as to any fact or there is any issue of fact involved summary judgment is not proper.

* * *

68 As your Honor will recall the Order of June 30th, 1948 signed by Judge Schweinhaut directed the Clerk to pay the money to Mr. Gallagher and Mrs. Drier. Up until that day or the day following, I felt that Mr. Gallagher would go to the extreme length, as I conceive it to be the duty of an attorney, to have his client carry out and perform an agreement which he, himself, had been instrumental in negotiating. On the first of July, however, when I served this motion and was informed that the funds had already been paid out, I became quite disillusioned. I nevertheless filed the motion and the motion was pending when the funds were deposited in the Union Trust Company and that motion was pending when the Treasury cashed the check.

* * *

69 Now I should like to pass, if it is agreeable with your Honor, to another motion in the case which I have filed and that is a motion for leave to file a counterclaim in this case. That counterclaim is based on this agreement of May 2, 1945 and was filed on behalf of Mr. Aron on February 25th. In the three counts—the first count is based on the provision of the agreement that Mrs. Drier would use one-third of the funds, \$54,497.32, then in the Registry of the Court to buy up claims against Mr. Aron in such amounts as he might designate or that might be designated by the Court; or that count seeks the recovery of \$18,000.00 some odd dollars.

70 The second count is based upon the provisions of the agreement that on all future amounts recovered, Mr. Aron shall have 30 percent for his fee. The second count relates to the deposit in the Registry of the Court of the \$27,000.00, except \$2500.00 some odd dollars.

Then there is a third count which relates to the \$11,000.00 deposited on February 15th of this year, seeking 30 percent of that. I want to discuss, if I may, briefly, the situation concerning those funds.

* * *

Of the \$54,000.00 paid into the Registry of the Court, \$8,975.80 applied on the original award to Mrs. Drier made by the Mixed Claims Commission, United States and Germany, through Mr. Aron as her counsel; \$45,521.52 was applied on the Private Law 509, to which reference has been made.

* * *

71 Now with respect to the additional deposit of
72 September 25, 1948 of \$27,932.51: \$11,913.29 of that amount was paid under Private Law 509 and \$16,019.22 paid under the original award. There certainly isn't anything invalid with respect to the contingent fee for securing those awards before the Mixed Claims Commission because all lawyers have been proceeding on that basis and paid on that basis.

* * *

79 The Court: Mr. Merrick, while you are still talking, I want to see if I have it clear as to the facts on which the motion for a contempt order is made.

I understand that there is no allegation that Mr. Gallagher or his client actually disobeyed any order that was entered by the Court. The allegation, as I understand it is that Mr. Gallagher had agreed, either
80 expressly or tacitly to enter an order which would have required these moneys to be paid out jointly to himself and to the attorney for Mr. Aron, that he procured the entry of an order permitting the money to be paid out only to himself and his own associates and that between that time and the time the money actually came

into his possession, you had served him with a motion to modify the order; that after he was served with that motion, he got the money out of the Registry and removed it from this jurisdiction. Then your motion, then pending, was later denied?

Mr. Merrick: That is right.

The Court: Are those all the facts?

Mr. Merrick: Those are substantially the facts and the further fact he personally represented to me that no order for the withdrawal of the funds from the Registry of the Court was necessary and no order had been obtained when the fact is an order was obtained without notice to counsel on June 30, 1948 affirming the opinion of the lower Court in accordance with the mandate from the Supreme Court and directing payment of the funds to himself and his client.

Now as to the other facts, your Honor is correct that the funds had not actually been withdrawn from the

Registry of the Court at the time the motion to
 S1 modify the judgment and make it conform to the original agreement and to the original motion for approval of that agreement was pending; that is during the pendency of that motion, the funds were removed from the Registry of the Court and from the jurisdiction of the Court and we maintain that that constitutes a contempt under the decisions, particularly the Merrimack Bank Case and other cases which I have cited and which your Honor will find in my memorandum.

* * *

112 The Court: Mr. Gallagher, it seems to me, however, that you did not answer what I regard as the part of this charge of contempt against you and that is that at the time a motion was served upon you that an order was sought to be modified you had not yet obtained the money from the Registry, or, if you had obtained it,

you had not disposed of it and that you did, after that and while the motion for modification was pending, dispose of this money and get it out of the jurisdiction.

I don't believe you have said anything about that, whether the facts are stated correctly or whether there is any duty, if the facts are stated correctly.

Mr. Gallagher: The record will show this payment was made on the 30th of June, Judge Schweinhaut signed the check on that day, gave it to Mr. Hendry. The motion that they filed was received in our Office July 2nd and, meanwhile, the check had been cashed; by a counter-check—the check was deposited in the bank on the 1st of July and sent directly to the Treasury and the check, the proceeds were withdrawn before the motion was filed.

The Court: And where were they?

Mr. Gallagher: In Mrs. Drier's hands.

The Court: That seems to be a disputed fact. Mr. Mer-
rick argued that at the time this motion was served upon
you and while it was pending that you actually had
113 in your possession this money which you had not
paid out.

That is what I am trying to get at.

That is, I think, the heart of the motion.

Mr. Gallagher: That is not so and had it been so, there wouldn't be any significance attached to it, anyway. The Court summarily overruled the motion—

The Court: (Interrupting) Afterwards, but at the time it was served upon you, it, created a pending dispute didn't it, in the litigation?

Mr. Gallagher: I don't see how it could. The order was final. The order in the case was absolutely final.

The Court: Suppose you had had the money in your possession and this motion to modify was served upon you and you paid out the money and then the motion to modify was sustained, then what would be the situation?

and how did you know that the motion to modify wasn't going to be sustained?

Mr. Gallagher: Well, the motion on its face was, in my humble opinion and obviously in Judge Schweinhaut's opinion too, was completely without any merit.

The Court: Who is to judge that, you or Judge Schweinhaut?

Mr. Gallagher: Judge Schweinhaut and he did "judge" it.

114 The Court: He judged it afterwards. I am talking about the situation as it was then?

Mr. Gallagher: The situation as it was then was we had received the money, the money was in our hands, the Register's check had been cashed, I had withdrawn the proceeds on a counter-check and all that was done before this motion was filed.

The Court: You told me awhile ago it was paid to Mrs. Drier.

Mr. Gallagher: It had.

The Court: Which is true—in your hands or Mrs. Drier's?

Mr. Gallagher: The funds had been drawn and turned over to her, immediately.

The Court: Before you had knowledge of the motion?

Mr. Gallagher: This is true, before the motion came into the office.

The Court: If that is so, it seems to me that disposes of the matter.

Mr. Gallagher: I made a notation of the date and time the motion was served on me "July 2nd." I don't know when it was filed down here.

The Court: I assumed, though I haven't read this file carefully, I assume there are some affidavits in
115 here stating these facts that you argued awhile ago, Mr. Merrick?

Mr. Merrick: Yes, your Honor.

The Court: Is there any affidavit denying those facts?

Mr. Merrick: No, not as to the denial.

Mr. Gallagher: There is a mistake about the date—motion filed July 1, 1948: my Certificate of Service says this: (Reads Certificate of Service)

Mr. Merrick: And then I say "This 1st day of July 1948." That is the day I delivered it and that is the day it was served on Counsel.

* * *

116 Now in the affidavit which Mr. Aron has filed, it stated (and is not denied) that that motion to modify the original judgment was served about 10:15 a. m. and while, as I stated, I was in their office, Mrs. Drier came in and they told me then that the money had been paid out but the records do not show it.

117 Now the Treasury Department, according to Mr. Aron's affidavit, informs us "Check not actually cashed at Treasury until July 2nd." That is a matter of record in the case.

The Court: Mr. Merrick, if Mr. Gallagher deposited that check and then issued his check and turned it over to Mrs. Drier, then I can't see where it makes any difference that the check didn't get into the Treasury until later; he would actually have received and paid out the money, it seems to me and that is the time to which this activity should relate: When did he dispose of this money by paying it out? If he did so before he had knowledge of your motion to modify, then I can't see any basis for holding him in contempt. If he did so afterwards, then there might be some basis.

Mr. Merrick: He has not submitted anything to show when he made the deposit in the bank.

The Court: I think Mr. Gallagher should be permitted, if he cares to do so, to file his affidavit in this case carrying out what he has just said in argument.

Mr. Merrick: If he made the deposit before I got there at 10:15 and issued his check to Mrs. Drier and delivered it, then I would say that your Honor is correct but he didn't do that: Mrs. Drier came in while I was there.

118 The Court: He says he did. If he wishes to file his affidavit to that effect, it seems to me that that is a sufficient refutation of your affidavits that he did not.

Mr. Merrick: I think under the conditions at that time, I think we ought to be permitted to cross-examine him; he ought to take the witness stand and be sworn.

The Court: Well, it wouldn't be proper to permit cross-examination of one party without cross-examination of the others.

Mr. Merrick: Mr. Aron is ready; so am I.

The Court: What is your desire in regard to that, Mr. Gallagher? Do you wish to file an affidavit?

Mr. Gallagher: Concerning these facts?

The Court: Yes.

Mr. Gallagher: I want to check a little more law and see if this point is of any consequence; if I feel it is, I am perfectly willing to file an affidavit,—these people are dealing with dates which follows the events in this case.

The Court: It seems to me incumbent on you, if you are going to file an affidavit to do so at this juncture because as the matter now lies, there is an affidavit in there on the part of Mr. Merrick, I suppose, or Mr. Aron?

119 Mr. Merrick: Mr. Aron signed it.

The Court: (Continuing) Setting up certain facts which, if true, may constitute a contempt and the matter is now on hearing before me and now is the time, if you are going to file your affidavit, that you should do so.

Mr. Gallagher: When I say I will file it or not, it will be done promptly within a matter of a day or two.

The Court: But I can't defer the matter for a day or two. This is my last opportunity to consider it and I will, how-

ever, defer it until this afternoon because it is just about time now to recess and I think during the recess you should decide, Mr. Gallagher, whether you wish to file the affidavit now or if not an affidavit you simply wish to make a statement under oath in the record, that will serve the same purpose and then I will permit both affiants to be cross-examined.

* * *

The Court: Gentlemen, I believe the question was, when the Court recessed for luncheon, whether Mr.
120 Gallagher wished to file an affidavit or give any testimony?

Mr. Gallagher: Your Honor, I cannot recall the facts now sufficiently to make an affidavit or give testimony until I look at my files. After all, it is sometime ago, and the point involved here is dates.

* * *

121 The Court: Let me ask this question, too: Suppose that there was some withholding order, carrying out of the jurisdiction of the funds to which Mr. Aron had a potential claim: Is there enough money in the Registry of the Court now in this same proceedings to take care of that if it should be adjudicated that he is entitled to it?

Mr. Gallagher: Yes.

The Court: What I have in mind is this: It is urged in support of this contempt proceedings that the act of Mr. Gallagher took outside the jurisdiction about \$18,000.00 to which Mr. Aron had some right. Now we have in the Registry of the Court about \$38,000.00 additional, which belongs either to Mrs. Drier or to Mr. Aron, or to
122 both of them, in certain proportions, subject to the claims of some intervenors.

Now why cannot the supposed shortage of \$18,000.00 be merged into the present claim against the money that Mrs.

Drier has taken, Mr. Aron's money, and used it for her purposes? Then he would get a bigger percentage of what is still here.

Mr. Gallagher: Let me refer your Honor to the counter-claim they seek to file: Total counter-claim \$29,000.00, which includes the eighteen, you referred to—the fund in the Court is \$31,000.00 more than the total amount he claims here. Now when I said to these Gentlemen earlier that it has always been my conception that this May 2, 1945 agreement between Mr. Aron and Mrs. Drier is a paper to which she is bound as contracting party, I would not attempt to say what Mr. Aron's claim is in dollars but whatever they are, he is entitled to whatever he can prove he can recover from this fund.

The Court: And he can get it out of the fund that is in the Registry of the Court now?

Mr. Gallagher: That is right. There is more than enough there now to pay the total claims in this counter-claim, if they are entitled to it.

Mr. Merrick: May I ask your Honor to inquire of Counsel whether that constitutes abandonment of his motion for summary judgment as to the \$27,000.00 and \$11,000.00 now in the Registry of the Court?

Mr. Gallagher: No.

The Court: I take it, Mr. Merrick, that that motion for summary judgment would be subject to whatever claim Mr. Aron might have to part of this fund by reason of the \$18,000.00 having been withheld?

Mr. Merrick: I assume his motion for summary judgment is based on the same grounds as the prior summary judgment: Mrs. Drier claimed the entire fund and succeeded in getting all of it except \$18,000.00 in the Registry of the Court. If the summary judgment were granted, the same situation would arise as before: if they got the money they would be entitled, according to their contention, to

use it as they saw fit without recognition of Mr. Aron's claim.

I just wonder now whether a stipulation might be made on the record that any judgment would provide for Mr. Aron's share?

Mr. Gallagher:

* * *

124 I say to Mr. Aron and Mr. Merrick, I think they ought to take steps to protect themselves to whatever part of that \$18,000.00 is due to them and whatever part is a legitimate claim in Mr. Aron's favor, I am certainly not going to oppose but I cannot surrender my motion for summary judgment; my motion for summary judgment stands. If we prevail, I have no objection to steps being taken by these gentlemen which will protect their claim for payment out of that fund.

Mr. Merrick: May it please the Court, that is the purpose of the counter-claim, to get an adjudication, if necessary, of Mr. Aron's rights in the funds now in the Registry of the Court and I don't know any other method of doing it. We have no judgment against Mrs. Drier and we can't bring a separate suit against her, we cannot get service, cannot attach this fund in the Registry—then we would be in contempt of court—there isn't any way of getting jurisdiction over Mrs. Drier other than in this particular case. That is the purpose of my counter-claim, your Honor, to get before the Court and to have a determination of Mr. Aron's rights in these funds.

125

Mr. Gallagher: Well, I just assume, Sir, that your Honor will permit the filing of the counter-claim. We opposed it, perfunctorily, on the ground if our motion for summary judgment is granted, it disposes of that question. Now I am not sure that would be true with respect to his claim to a portion of the reserve fund (let's call it), the \$18,000.00; but if the Court should decide the motion for

summary judgment in our favor—I am just thinking out loud, I don't know what the mechanics would be, but let me state a principle: that perhaps some—I don't want to call it a "lien" but some mark could be impressed upon this fund in Mr. Aron's favor, for whatever part of this reserve fund, \$18,000.00, he can establish belongs to him. I have no objection to protecting Mr. Aron but my point at the beginning was, was some way to protect himself without my neck getting in the noose with my client.

The Court: I think that the Court should first act on the motion for permission to file the counter-claim.

I will act on that motion by granting it.

And then, considering that as among the pleadings and since that involves the claim for the \$18,000.00 as well as some other claims, I will deny the motion for summary judgment and I will then deny the motion that Mr. Gallagher—
was there somebody else?

126 Mr. Gallagher: My associate, Mr. Hendry and plaintiff.

The Court: Mr. Hendry and plaintiff be held in contempt.

* * *

Mr. Merrick: Your Honor, may we have some order to provide no funds shall be withdrawn from the Registry of the Court pending appeals, if there should be any, and pending further proceedings?

The Court: What orders does anyone have for withdrawing funds?

Mr. Gallagher: There wouldn't be any order.

The motion for summary judgment has been overruled.

Mr. Merrick: We want to safeguard the funds sofar as possible to prevent what has occurred previously.

* * *

127 Mr. Gallagher: Let me make this comment: this case has so many twists and turns, I don't know what

will happen in the next—I assume this, your Honor is denying our motion for summary judgment—I suppose we could petition for allowance of special appeal from that order: suppose your Honor is reversed? We could come in and get the money.

I don't want to be in a position for these Gentlemen to come along later on and we have to go through this proceedings again.

* * *

128 Mr. Aron: I don't pretend to be familiar with the practice of the District but I am as anxious as Mr. Gallagher we don't have to repeat our performance on this affair. Your Honor, in denying our motion for contempt could you not contain the provision "No funds may be drawn from the Registry of the Court except by notice and and on Court order"?

* * *

* * *

155

Order of Affirmance

(Filed Jun 30, 1948.)

Harry M. Hull, Clerk

Betsy Ritchie (Aron) having appealed to the United States Court of Appeals for the District of Columbia from the Order of the District Court of the United States for the District of Columbia, dated November 15, 1946, filed November 18, 1946, and said Court having issued its mandate dated the 24th day of June, 1948, wherein it was ordered, adjudged and decreed that the Order of the District Court hereinbefore described be affirmed with costs assessed at One Hundred Twenty-one Dollars (\$121.00) in favor of Katharine M. Drier, appellee:

Now, upon the mandate of the United States Court of Appeals for the District of Columbia, dated the 24th day of June, 1948.

IT IS ORDERED, ADJUDGED AND DECREED That the order entered in this cause on the 15th day of November, 1946, filed November 18, 1946, be and it is in all respects affirmed,

WHEREAS, under the order of the District Court hereinbefore described, there was to be paid to Katharine M. Drier, the sum of Thirty-six Thousand Three Hundred Thirty-one Dollars and Fifty-five Cents (\$36,331.55), less the Clerk's fee incident thereto; and

WHEREAS, under order of this Court dated July 17, 1947, there has been paid to Katharine M. Drier the sum of Five Thousand Dollars (\$5,000.00) less the costs incident thereto, out of the sum of Thirty-six Thousand Three Hundred Thirty-one Dollars and Fifty-five Cents (\$36,331.55) referred to above, now

156 IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the Clerk of the United States District Court for the District of Columbia be, and he is hereby, authorized and directed to release and pay forthwith to Katharine M. Drier, and Bernard J. Gallagher, as her attorney, jointly, the sum of Thirty-one Thousand Three Hundred Thirty-one Dollars and Fifty-five Cents (\$31,331.55), being the balance ordered to be paid Katharine M. Drier in the order of this Court dated November 15, 1946, filed November 18, 1946, less the Clerk's fee incident thereto, and it is, also

ORDERED That Katharine M. Drier recover of Betsy Ritchie (Aron) or her surety on her cost bond in this cause, the sum of One Hundred Twenty-one Dollar (\$121.00) costs

as ordered by the United States Court of Appeals for the District of Columbia.

H. A. SCHWEINHAUT,
Justice.

157 **Motion for Order Modifying Final Judgment
as to Disposition of Funds Deposited in
Registry of Court**

(Filed July 1, 1948.)

Now comes Harold G. Aron, Defendant No. 2 in the above entitled cause, by counsel, and moves the Court for an order modifying the final judgment herein and directing distribution of the funds in the Registry of this Court, as follows:

(1) \$18,165.77, less \$5,000.00 previously disbursed and the Clerk's fees incident to such fund, to Katharine M. Drier, plaintiff, and Bernard J. Gallagher, her attorney;

(2) \$18,165.77, less the Clerk's fees incident thereto, to a trustee or trustees, to be named by the Court, to be used for the further prosecution of plaintiff's claim against the United States, for reimbursement of disbursements made by this defendant on plaintiff's behalf, if any, and for withdrawals by plaintiff and this defendant at the rate of \$300.00 each per month, and

(3) \$18,167.77 to remain in the Registry of the Court pending further order of Court following reference of the case to the Auditor for determination of the interests, if any, of the intervenors and other parties, if any, therein;

upon the grounds and for the reasons that the settlement agreement of May 2, 1945, between plaintiff, Katherine M. Drier, and this defendant, Harold G. Aron, which was approved by this Court, provides for such distribution, but the terms thereof were not properly carried out by the judgment of this Court of November 15, 1946.

RICHARD L. MERRICK,
640 Woodward Bldg.,
Washington 5, D. C.,
Attorney for Defendant No. 2.
Harold G. Aron.

158

CERTIFICATE OF SERVICE.

I hereby certify that service of the foregoing Motion for an order modifying the final judgment in this cause and the accompanying Points and Authorities in support thereof was made by delivery of a carbon copy of each to Messrs. Bernard J. Gallagher and M. Walton Hendry, Suite 525 Union Trust Building, Washington 5, D. C., and by mailing carbon copies thereof to the following:

Hon. George Morris Fay,	Sotorios Nicholson, Esq.,
United States Attorney,	Burlington Hotel,
Court House,	Washington, D. C.,
Washington 1, D. C.,	Attorney for Stern Bros.,
Attorney for Defendant,	and Bonwit Teller.
Henry Morgenthau, Jr.	

Robert C. Bell, Jr., Esq.,	Henry W. Parker, Esq.,
No. 1 Atlantic St.,	56 E. 42nd St.,
Stamford, Conn.,	New York 17, N. Y.,
Attorney for Betsy Ritchie	Attorney for Morris
(Aron).	Plan Industrial Bank.

Edwin A. Mooers and
 Edwin A. Mooers, Jr.,
 Union Trust Building,
 Washington 5, D. C.,
 Attorneys for Morris
 Plan Industrial Bank,
 this 1st day of July, 1948.

Walter Bastian and
 A. K. Shipe, Esquires,
 National Press Bldg.,
 Washington, D. C.,
 Attorneys for Great
 Lakes Steel Co.,

RICHARD L. MERRICK,
 640 Woodward Bldg.,
 Washington 5, D. C.,
Attorney for Defendant No. 2,
Harold G. Aron.

**161 Affidavit of Harold G. Aron in Reply to Plaintiff's
 Opposition to Motion to Modify Final Judgment**

(Filed Aug. 27, 1948.)

District of Columbia, ss.:

I, Harold G. Aron, Defendant No. 2 in the above cause, being first duly sworn according to law, on oath depose and say

In 1928 a prominent Washington tax attorney asked me to interest myself in the case of Katharine M. Drier, (known as the Baroness Katharine von Rosenberg Drier), as it involved questions of international law with which he was not familiar. At that time, Mrs. Drier was in destitute circumstances and was about to be ejected from the Wardman Park Hotel in Washington, D. C., for non-payment of room rent and other charges. She was the widow of an Austrian Baron, having since his death remarried a member of the Foreign Service of the United States who was then serving as American consul at Dresden, named Drier,

from whom she later was divorced. At the death of Baron von Rosenberg, Mrs. Drier became possessed of a valuable estate at Pirna, near Dresden, which the German Government had seized and sold at the end of the first World War. She made claim for indemnity, and prior to my entering the matter had, through other attorneys, agreed to accept \$48,000 as an award from the Mixed Claims Commission, United States and Germany. After hearing her story, I decided she had a meritorious case and agreed to act as her counsel. I arranged a loan which enabled her to pay her hotel bill, and took up her cause. My efforts met with instantaneous rejection of the claim by the American Agent of the Mixed Claims Commission, United States and Germany, who relied upon her prior agreement duly

solemnized to accept \$48,000 in full payment
 162 for her losses. I succeeded in re-opening the matter and procured for her an award of the Mixed Claims Commission, United States and Germany, of \$250,000, which, with interest, totaled about \$500,000. Mrs. Drier received in all about \$400,000 to apply on her claim, leaving a balance of about \$160,000 unpaid. She then took a villa on the Mediterranean and a few years later was again in a destitute condition. I pursued the matter further and procured the agreement of the German Government to pay her an additional \$160,000, with interest, which, with the accrued interest, reached a total close to an additional \$500,000. The German Government then repudiated its agreement alleging that her claim was fraudulent, and refused to consent to permitting the Mixed Claims Commission, United States and Germany, to enter a further award in accordance with an agreement I had procured with the German Foreign Office. I then took the case to Congress, and by a private act, quite unprecedented in international law, Congress ordered the Secretary of the Treasury to pay the agreed award out of German funds then in the

possession of the Treasury Department. As a result of all such efforts, Mrs. Drier has received upwards of half a million dollars, and is entitled to receive approximately as much more, less the payment she received recently, which is the subject of this controversy.

During the years from 1928 to 1941, I advanced to or borrowed for Mrs. Drier, with my personal guarantee, over \$50,000, in order to sustain her and her dependents. During these years, I spent weeks in Europe in defending her from charges of fraud brought by creditors, her son-in-law, and the German Government, and in procuring her release from prison on such charges and in successfully resisting them. In this country, I similarly protected her successfully in lawsuits brought against her and in securing recoveries in lawsuits instituted in her behalf, and many times provided her with medical attention, food and shelter, when she was without funds and friendless.

In 1941, as the result of Congressional action previously referred to, Mrs. Drier became entitled to receive
163 \$160,000. Of this amount, \$20,000 was paid to discharge a note which I had guaranteed, and \$40,000, at her instance and request, was left in the Treasury of the United States to be paid to me, in order that she might obtain the balance of \$100,000. The reason for this arrangement was that my divorced wife had filed certain claims with the Secretary of the Treasury, asserting that she was entitled to receive my stipulated fee of \$40,000. By action of the Supreme Court of the United States in impliedly affirming the decision of the United States Court of Appeals for the District of Columbia and the judgment of this Court in this cause, this claim of my divorced wife has been denied and found to be groundless.

Shortly after 1941, Mrs. Drier insisted that I undertake certain matters in her behalf, which did not have my ap-

proval, and, as there were no matters then pending in which I had any continuing professional duty, I notified her that I would no longer serve as her counsel, and demanded payment of a fee of \$250,000 and the balance due me of approximately \$25,000 for payments I had made or disbursements I had met on her behalf. *She failed to meet this demand, and I started action against her in this Court.* That action dragged, due to dilatoriness of counsel for both sides. Prior to my withdrawal as counsel for Mrs. Drier and before any disagreement developed between us, I went to East Hartwick Vermont, the home of her half-sister, Alice L. Delano, at her request, and we then agreed that I would arrange to employ a recognized public accountant to prepare and audit the account between us as to the moneys I had received under her power of attorney and the moneys I had paid out for her account. Immediately after my return to New York, I retained such an accountant, and, although it was agreed that the expense thereof would be divided equally between us, as I insisted on such method, which she said was not necessary, she promptly repudiated her agreement and it became necessary for me to enter the suit above referred to, of which this Court may take judicial notice, including the bill of particulars enumerating the services I rendered and the disbursements I made on Mrs. Drier's account, to which
 action (*Civil Action No. 12,832*) reference is hereby
 164 made with the request that the same be considered
 in connection herewith.

In 1945, Mrs. Drier's son came to see me and said his mother was again destitute and asked me if I would not again represent her in order to obtain all or some part of the balance of about \$400,000 still due her on the awards I had procured for her. I did not know at that time that long after I had notified her in writing that I would no longer represent her as counsel she had represented to the State

Department that I was still her counsel, and, on the faith thereof, had procured favorable action by the State Department in a matter which is in no way related to the present controversy. As a result of Mrs. Drier's son's overtures, I agreed to consider a limited representation of her, and the resulting agreement is that which has now been approved by this Court, the United States Court of Appeals for the District of Columbia, and, by necessary implication, the Supreme Court of the United States. The agreement speaks for itself. I refused, however, to make such agreement unless simultaneously Mrs. Drier agreed to pay \$6,000 due a law firm in Washington, King and King, who had been brought in to assist me in a tax claim against Mrs. Drier, with her consent and approval. In this tax matter, although it went to two separate circuit courts of appeal, we succeeded in completely defeating tax claims which otherwise would have amounted to over \$50,000 on amounts Mrs. Drier had received under the awards of the Mixed Claims Commission, United States and Germany. As a result of my insistence, she entered into a written agreement to pay the fee of Messrs. King and King, who recently have intervened in this matter, because of Mrs. Drier's refusal to recognize and honor her agreement made in 1945.

The agreement between Mrs. Drier and myself, dated May 2, 1945, was submitted to this Court for approval, and has been approved, as above shown, by the United States Court of Appeals for the District of Columbia through its affirmance of the judgment of this Court, and by necessary inference by the Supreme Court.

When the said agreement was presented to this Court, the motion filed relative thereto asked that it be
 165 approved and that the Court direct that the funds, then amounting to approximately \$54,000 deposited by the United States Treasury into the Registry of this

Court, be paid to Mrs. Drier's attorney and my attorney, as trustees, for disbursement. In the course of the hearings and without my knowledge and for reasons unknown to me, the order approving the agreement made by Mr. Justice Schweinhaut provided that the money in the Registry of the Court be paid to Mrs. Drier and her attorney, Bernard J. Gallagher. I had changed attorneys by the time the decision was rendered, and my then and present attorney attached no significance to this change made by Mr. Justice Schweinhaut and felt that I was adequately protected, since the money could not be disbursed without the active cooperation of a member of the bar in good standing and by the terms of the order clearly constituted a trust fund. After the decision of the United States Supreme Court, denying certiorari, Mr. Merrick was not in his office when I called him on my arrival in Washington, and I called Bernard J. Gallagher, the attorney for Mrs. Drier, and asked him whether the mandate had come down and what provision he was making for disbursement of the funds. I had previously wired him on June 26, 1948, as shown by the attached copy of telegram, marked Exhibit A, which is made a part hereof by reference. This telephone conversation was on June 30, 1948, about three in the afternoon. Mr. Gallagher stated that his client was "on his neck" and that he could not do other than collect and disburse the money to her without regard to my rights, unless I served him with some kind of court papers; whereupon, I instantly called my attorney, Richard L. Merrick, and found him in his office, and the following morning at about 10:15 A. M., Mr. Merrick served the motion papers now before this Court on Mr. Gallagher at his office. There were present at that time, Mr. Gallagher, M. Walton Hendry, Esquire, and a secretary. Mr. Gallagher and Mr. Hendry informed Mr. Merrick that his papers were too late, as the money had already been received and "paid

out". While Mr. Merrick was in the office of Mr. Gallagher and Mr. Hendry, Mrs. Drier came in and was introduced to Mr. Merrick, who left a copy of the motion and supporting points and authorities, and departed. I knew
 166 nothing of all this until August 4, 1948, about 3:30

P. M. I immediately sent night telegrams to Mrs. Drier and to Mr. Gallagher and Mr. Hendry, demanding that there be paid to me my portion of the money received, in accordance with the 1945 agreement and court orders appertaining thereto. No response has been made to these telegrams, except a letter, dated August 5, 1948, from Mr. Gallagher, a copy of which is hereto annexed as a part hereof, marked Exhibit B. On August 5, 1948, with Mr. Merrick, I examined the Court records in this matter, which show that on June 30, 1948, the day I spoke to Mr. Gallagher, Mr. Hendry had procured an *ex parte* order signed by Mr. Justice Schweinhaut, prepared apparently by Mr. Hendry, in which he stated that the amount in the Registry of the Court, to the extent of \$36,000 was payable to Mrs. Drier, who had previously received out of the Registry of the Court, also on an *ex parte* order, \$5,000. Pursuant to this *ex parte* order of June 30, 1948, which seems to be the only Court action taken in this matter without previous notice to my attorney and seven other lawyers and law firms representing various parties claiming to have an interest in the fund deposited in the Registry of the Court, Mrs. Drier and Mr. Gallagher received a check to their order for \$31,018.23, the same being dated June 30, 1948, and numbered 5566, signed by the Clerk of this Court. When later communicated with by Mr. Merrick, Mr. Gallagher stated that there had been no additional court order entered and none was necessary, although in the statement filed in answer to the motion now before this Court, it is stated, and there was as a matter of fact, an order obtained *ex parte*, as hereinabove shown, apparently by Mr. Hendry.

As above stated, on the occasion of Mr. Merrick serving the pending motion upon Mr. Gallagher and Mr. Hendry they stated that immediately upon receiving the court order, they procured a check from the Clerk of this Court, took it to the United States Treasury and there cashed it, taking out their fee and delivering the balance of the cash to Mrs. Drier. I am now informed and believe and therefore allege as a fact that said check was paid over the counter at the Treasury Department to a messenger of the Union Trust Company of Washington on July 2, 1948.

167 Mrs. Drier has left the City of Washington and is now out of the jurisdiction of this Court as far as any new proceeding to recover the money thus abstracted is concerned. I am informed that Mrs. Drier has an account in one of the banks of this City and of the City of Boston, and I know of no reason why such a large amount should be handled in cash. By way of explanation, Mr. Gallagher states that Mrs. Drier brought into their office a new attorney, who, to quote Mr. Gallagher "raised so much hell" that he had to do as he did, despite his statement to me of the previous day. The name of the new attorney is given as Daniel J. Anderson, of the firm of Magee, Beedy and McGovern, Munsey Building, Washington, D. C.

On inquiry at the Treasury Department on August 5, 1948, I was informed that a motion had been filed herein by the Government for authority to pay into the registry of this Court an additional sum of approximately \$27,000. Upon inquiry as to why this money should be paid into the registry of this Court in litigation finally ended, I was informed that the Treasury Department would not pay out such funds without the consent of all parties or a final court order. I then pointed out that no one had any interest or claim therein, except Mrs. Drier and myself, and learned for the first time that Mrs. Drier had repudiated the agree-

ment of 1945 with me, which had just received the sanction of the Supreme Court after years of bitterly contested litigation, and asserted that she owes me nothing. I was further advised that the Treasury Department had been put under the most intense political pressure by a Senator from Vermont, the State from which Mrs. Drier's family comes, to compel it to pay over the entire additional fund of about \$27,000 to Mrs. Drier without recognizing my right and interest therein, of which the Treasury Department had been duly notified.

The information given me at the Treasury Department was the first intimation I had received that Mrs. Drier challenged my rights under the 1945 agreement, made with her at her request. Prior thereto in the action begun by me to recover \$250,000 for services rendered and some \$25,000 for disbursements, Mrs. Drier had pleaded that her agreement to pay me was void because it was a lobbying contract, but I had assumed, as is correct, that the
 168 settlement agreement of 1945 wiped out this contention and that it had disappeared from the case, in view of the action of the courts in approving that settlement agreement, including the Supreme Court of the United States, to which the same proposition as to lobbying had been presented in connection with the application for writ of certiorari. That Mrs. Drier has throughout intended to resort to any means to defeat my recovery from her is now clear and many things done by her and her attorneys now appear in true focus.

Pursuant to my duty and authority under the 1945 agreement with Mrs. Drier, I decided that a suit should be instituted on behalf of Mrs. Drier and other holders of unpaid awards of the Mixed Claims Commission, United States and Germany, under the recently enacted Federal Tort Claims Act. As a matter of courtesy, although under no obligation to do so, I invited Messrs. Gallagher and

Hendry to join me in the litigation and agreed on their specific share of any fee resulting therefrom and another case of a similar nature in which I had been retained. While we were in weekly conferences in this matter, Mrs. Drier's attorneys, without my knowledge or consent, filed an abortive and unsuccessful action in the United States Court of Claims to procure the payment of the full amount due Mrs. Drier, which was done with full knowledge of the 1945 agreement between Mrs. Drier and myself, as one of Mrs. Drier's counsel represented her in its negotiation and was present when it was signed by her, as is also true of the agreement by Mrs. Drier to pay the firm of King and King the amount previously mentioned herein.

Under an agreement made in 1941 by Mrs. Drier with the then Secretary of the Treasury at her urgent request, because she was without funds, of the \$54,000.00 deposited in the Registry of this Court, approximately \$45,000 was indefeasibly mine in accordance with my agreement of retainer, which had been fully disclosed to the Foreign Relations Committee of the Senate and the War Claims Committee of the House of Representatives. When Mrs.

169 Drier came back to me in 1945, through the intervention of her son, she again was desperately in need of funds, and I, therefore, agreed to let her have \$18,000 of the \$54,000 then in the Registry of this Court. Due entirely to the unjustifiable interference of my divorced wife, an additional \$18,000 was to be used to pay creditors with whom I had become obligated, due also to the actions of my divorced wife. The remaining \$18,000 was to be used to provide maintenance for Mrs. Drier and to carry on her litigation and to recover for her the remainder of her award, with interest, in which undertaking I am now engaged. Out of this \$18,000 were to come court costs and disbursements made by me in my efforts to recover the approximately \$400,000 still due under Mrs.

Drier's award, which costs and disbursements have been paid from my own funds. After providing for such expenses, Mrs. Drier was to be entitled to \$300 per month and I was to receive a like amount until the fund became exhausted. This resulted from a prolonged conference attended by Mrs. Drier, her son, Mr. Gallagher, her attorney, Mr. Galloway, my attorney, and myself. It also was agreed at that conference that Messrs. King and King were to be paid the amount of \$6,000 due them.

As to the money in the Registry of the Court, it was specifically and definitely understood and agreed that when payment was made by the Clerk of the Court, it was to be made by check to the order of Herman J. Galloway and Bernard J. Gallagher, who were to disburse it in accordance with the terms of the agreement, and the motion papers presented by Messrs. Gallagher and Hendry so stated.

The arrangement set forth in the agreement of 1945, as above shown, has been approved by this Court and the United States Court of Appeals for the District of Columbia, and by implication the Supreme Court of the United States. As a result of the approval of this Court of the agreement of 1945, the contention might be made that it operates from its date, and that, therefore, Mrs. Drier and I are entitled to divide equally the sum of \$18,000, after payment of the costs of pending litigation and disbursements made by me. I do not insist upon such interpretation of the agreement, but believe it would be more prudent to begin now the disbursement of this \$18,000
 170 at the rate of \$300 per month to each of us. In any event, not more than \$27,000 of the \$54,000 deposited in the Registry of the Court properly could, by any conceivable contention, belong to Mrs. Drier. Nevertheless, she actually has received more than \$36,000 of the amount deposited in the Registry of the Court. In addition to the

\$27,000 of the amount formerly in the Registry of this Court to which I am unquestionably entitled under the 1945 agreement and the judgment of the Court, I am by agreement with Mrs. Drier entitled to receive approximately \$9,000 of the additional payment of \$27,000 tendered to the Court by the Secretary of the Treasury, which I have procured for Mrs. Drier on account of her award, referred to above herein.

There is thus a total of approximately \$36,000 now due me. In addition, there is due Messrs. King and King the sum of \$6,000 under the agreement which Mrs. Drier made with them in 1945 and upon which I insisted as a condition to my accepting re-employment by her. Moreover, there remains my as yet unsettled demand for \$250,000 for legal services and my disbursements, which by the agreement of 1945 are to go to arbitration and an accounting. There still remains in the Registry of this Court approximately \$18,000; there is payable by the Treasury Department at this time out of the German Special Deposit Account on account of Mrs. Drier's award about \$27,000, making a total of approximately \$45,000. Under the agreement of 1945 between Mrs. Drier and me, approved by the Court as aforesaid, there is due me the sum of \$36,000. There is also due the amount of \$6,000 to Messrs. King and King, as previously shown.

It thus remains in the power of this Court on this motion to see that justice is done to all parties concerned, and, so that it may be certain that I am not trying to divert any part of the money due me away from my creditors or any others who have just claims against me, resulting from the consequences of the great amount of time I gave to Mrs. Drier's battle with the German Government and the efforts of my divorced wife to take advantage of my discomfiture during the depression beginning in 1929 and continu-

171 ing for some years thereafter, I am entirely agreeable that this Court direct that the entire sum of \$36,000 due me shall be paid into the Registry of this Court, to be disbursed as this Court shall see fit and consider just, but I must respectfully request that this Court prevent the wrongful removal of funds beyond its jurisdiction in order to defeat my just claims and the claims of others, as hereinabove shown.

(S) HAROLD G. ARON.

Subscribed and sworn to before me this 26th day of August, 1948.

(S) THEODORE L. BLOCK,
(Notarial Seal) *Notary Public, D. C.*

172 EXHIBIT A.

(Copy of Telegram)

Madison, Conn., June 26, 1948.

Bernard J. Gallagher,
Union Trust Building,
Washington, D. C.

Merrick just called. Do nothing until I arrive Wednesday. Signed agreement provides money payable to you and Galloway. I have agreed to no change. For your protection ascertain Client's condition and status. Am sure you will not act without my consent or court order otherwise I shall have to hold you personally liable.

HAROLD G. ARON.

EXHIBIT B.

(Copy of Letter)

HENDRY, GALLAGHER & THOMPSON
Attorneys at Law
Union Trust Building
Washington 5, D. C.

M. Walton Hendry
Bernard J. Gallagher
J. Roy Thompson, Jr.

Telephone
Metropolitan 4367

August 5, 1948.

Harold G. Aron, Esq.,
726 Jackson Place, Northwest,
Washington, D. C.

Dear Sir:

Receipt is acknowledged of your telegram dated August 4, 1948, addressed to Mr. Hendry and to me.

Inasmuch as the agreement of 1945 was between yourself and Mrs. Drier, I suggest that you direct to her any claim you have pursuant thereto.

This office has paid to Mrs. Drier the funds which came into our hands pursuant to Mr. Justice Schweinhaut's order, after deducting only our fee.

Yours very truly,

(S) BERNARD J. GALLAGHER
(T) BERNARD J. GALLAGHER

BJG:h

176

Washington, D. C.,
Wednesday, October 13, 1948.

Deposition of H. NORMAN GLASCO, a witness of lawful age called on behalf of defendant Harold G. Aron, pursuant to notice attached to the court copy of this deposition, at Suite 707 Arlington Building, beginning at 2 p. m., before Lucius V. Friedli, a notary public in and for the District of Columbia, when were present on behalf of the respective parties:

M. WALTON HENDRY, Esq., for the plaintiff.

RICHARD L. MERRICK, Esq., for defendant Harold G. Aron.

* * *

177 Thereupon

H. Norman Glasco was called as a witness on behalf of defendant Harold G. Aron and after having been duly sworn by the notary was examined and testified as follows:

Direct Examination by Mr. Merrick:

Q. Mr. Glasco, will you please state your name? A. H. Norman Glasco.

Q. I take it you are over 21? A. Yes.

Q. Where do you live, Mr. Glasco? A. I live in Bethesda, Maryland.

Q. What is your occupation? A. Assistant treasurer, Union Trust Company.

Q. Were you assistant treasurer of the Union Trust Company during the months of June and July, 1948? A. I was.

* * *

178 Q. Do you have those records with you, Mr. Glasco? A. Yes.

Q. May I see them, please?

(Two photostats were handed to Mr. Merrick.)

Q. Are these your retained records, or are they photostatic copies? A. They are photostats of our records.

The reason I did that was because I did not want to bring here an active ledger sheet.

* * *

179 Mr. Merrick: I offer in evidence as Exhibit A a photostatic copy of the ledger sheet relating to the account of Bernard J. Gallagher, Special, showing a deposit on July 1, 1948, of \$31,018.23, and a withdrawal on July 6, 1948, of the same amount.

* * *

Mr. Merrick: I also offer in evidence photostatic copy of a deposit slip dated July 1, 1948, showing the same amount, namely \$31,018.23, for the credit of the account of Bernard J. Gallagher, Special. This is offered as Exhibit B.

* * *

(The 2 photostats referred to were marked, respectively, Defendant Aron Exhibits A and B, and they are attached to the court copy of this deposition.)

* * *

182

Appellant's Exhibit A

MR. BERNARD J. GALLAGHER—SPECIAL
Union Trust Bldg.
City 5

<i>Checks in detail</i>	<i>Deposits</i>	<i>Date</i>	<i>Balance</i>
<i>Balance Brought Forward</i>			
	550.00	May 19 48	550.00
30.16		May 21 48	519.84
200.00		Jun 14 48	319.84
200.00		Jun 28 48	119.84
	31,018.23	Jul 1 48	31,138.07
31,018.23		Jul 6 48	119.84

UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA

183

Appellant's Exhibit B

Deposited with
UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA
For Credit of BERNARD J. GALLAGHER
Special
July 1, 1948
U. S. Treas. check 31,018.23
Collected over counter at Treas. Dept.
Total \$31,018.23

184

Order

Upon consideration by the Court of the motion of Harold G. Aron for order modifying final judgment as to disposition of funds deposited in Registry of Court, the Court having heard argument of counsel on the said motion, it is by the Court on this 20 day of October, 1948.

ADJUDGED, ORDERED AND DECREED, That the said motion be and the same hereby is denied.

(S) H. A. SCHWEINHAUT,
Judge.

**Motion of Harold G. Aron, Defendant No. 2, to
Adjudge Plaintiff and Her Counsel in Con-
tempt and for Order Directing Them to Re-
store Funds to Registry of Court**

185

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KATHARINE M. DRIER,
Plaintiff,

v.

JOHN W. SNYDER, *et al.*,
Defendants.

Filed Nov. 3, 1948.
Civil Action No. 19,367.

Now comes Harold G. Aron, Defendant No. 2 in this cause, and moves the Court for an order:

1. Adjudging the plaintiff, Katharine M. Drier, in contempt of this Court for removing from the jurisdiction of this court the subject matter of a pending proceeding herein before the termination thereof.

2. Adjudging Bernard J. Gallagher and M. Walton Hendry, attorneys for plaintiff herein, in contempt of this Court for aiding and assisting the plaintiff in the removal from the jurisdiction of this Court of the subject matter of a pending proceeding herein before the termination thereof.

3. Requiring the said plaintiff, Katharine M. Drier, and said Bernard J. Gallagher and M. Walton Hendry to restore or cause to be restored the sum of \$31,018.23 to the Registry of this Court.

The grounds and reasons for the foregoing motion are fully set forth in the annexed affidavit of Harold G. Aron,

Defendant No. 2, and in his affidavit of August 27, 1948, filed herein.

RICHARD L. MERRICK,
1025 Vermont Ave., N. W.,
Washington 5, D. C.,
Attorney for Harold G. Aron,
Defendant No. 2.

187 **Affidavit in Support of Motion for Adjudication
in Contempt and for Order of Court Directing
Restoration of Funds to Registry of Court, in
Opposition to Motion for Summary Judgment
and in Support of Motion to Refer Cause to
Auditor**

District of Columbia, ss.:

HAROLD G. ARON, being first duly sworn according to law, on oath deposes and states as follows:

By reference, he makes a part of this affidavit the statements set forth in his affidavit of August 26, 1948, filed herein on August 27, 1948, to the same extent as if set forth in full herein.

It now appears by the deposition of H. Norman Glasco, Assistant Treasurer of the Union Trust Company, which also is made a part hereof and which was taken in this cause, that Bernard J. Gallagher had on deposit in his account at said Union Trust Company the full amount of the money withdrawn from the Registry of this Court on July 1, 1948, and for five days thereafter, although he had stated on July 1, 1948, that said funds had already been paid out.

It now appears from the motion filed herein for summary judgment that the withdrawal of the money from the

Registry of this Court was part of a scheme to place beyond the reach of this Court and recovery by this deponent the sum of approximately \$18,000.00, which plaintiff and her attorneys, Bernard J. Gallagher and M. Walton Hendry well knew belonged to this deponent. Were the facts otherwise, the persons named would not now be seeking to obtain possession of the sum of \$27,932.51 recently deposited in the

Registry of this Court, over their objection, by the
188 Secretary of the Treasury. Even though the \$31,000.00 withdrawn from the Registry of this Court has been completely dissipated, the fortuitous payment of an additional sum exceeding \$27,000.00 into the Registry of this Court makes possible the correction by the plaintiff, Bernard J. Gallagher and M. Walton Hendry of the wrong done to this deponent, so that this deponent would suffer no loss. The effort to obtain the additional \$27,000.00 payment by a judgment on the pleadings and without a hearing of the facts precludes any contention of innocence in the removal and disposal of the fund of \$54,000.00 except as to \$18,000.00, originally deposited in the Registry of the Court. Moreover, it completes the chain of evidence which established beyond reasonable doubt the intention and objectives of the combined actions of the plaintiff, Bernard J. Gallagher and M. Walton Hendry.

This chain of evidence begins with the fact that the agreement of 1945 was executed after hours of discussion at 1620 Eye Street, Northwest, Washington, D. C., attended by Bernard J. Gallagher as attorney for the plaintiff, Mrs. Drier. There were also present Mrs. Drier, her son, Baron von Rosenberg, this deponent, and Herman J. Galloway, as deponent's attorney. It is witnessed in the handwriting of Baron von Rosenberg. It was then agreed specifically and in terms, as is corroborated by the original motion papers prepared by Bernard J. Gallagher, that any moneys

paid out of the Registry of the Court were to be paid to Messrs. Galloway and Gallagher as trustees for the purposes of carrying out the agreement of 1945, which inter alia, provided for monthly payments of a total of \$18,000.00 over a period of approximately two and one-half years.

Almost immediately after the execution of the 1945 agreement in which, at Mrs. Drier's request, this deponent became her sole counsel in the matter of the Mixed Claims Commission award, entirely without the knowledge of this deponent and without disclosure to him at the time or at any time since then, said plaintiff and Bernard J. Gallagher started an action in the Court of Claims to compel payment to Mrs. Drier of the awards of the Mixed Claims Commission by the United States Government, which failed as it was foredoomed on its face to do as a matter of law.

189 Before this matter came before Mr. Justice Schweinhaut on the original motion of plaintiff for summary judgment, this deponent was obliged to change counsel. Before new counsel had an opportunity to familiarize himself with the facts, Bernard J. Gallagher, in complete violation of the motion papers he had alone prepared, and also in violation of the terms of the agreement of May 2, 1945, which he had helped to prepare, prevailed upon the Court to issue an order, directing payment of the moneys then in the Registry of the Court to himself and Mrs. Drier, to the complete exclusion of the deponent's counsel or anyone representing him.

Said Bernard J. Gallagher lulled this deponent and his counsel into letting the order stand because of a then existing confidence between him, this deponent, and his present counsel. To such an extent did this confidence extend that this deponent made a place voluntarily for said Bernard J. Gallagher and Mr. Walton Hendry in the action of Drier v. Snyder, in this Court, numbered 894-47, and agreed to

share any resulting fees with them. Such was the situation when the United States Supreme Court denied certiorari in this case, which resulted in finally releasing the funds in the Registry of this Court. Out of a clear sky, said Bernard J. Gallagher informed this deponent that he could not be responsible for the distribution of any funds that came into his hands. Deponent at once telegraphed said Gallagher, as shown by his affidavit of August 26, 1948, heretofore referred to herein. Three days later, on arriving in Washington, as previously shown, he talked with said Gallagher on June 30, 1948, about three o'clock in the afternoon. Said Gallagher stated that plaintiff, Mrs. Drier, and her new attorney, Mr. Anderson, were "on his neck" and he was powerless to keep the money away from her, unless some kind of motion papers or proceedings were served upon him, which was done the next morning, at which time the money was on deposit to the credit of said Gallagher in his bank or was deposited therein later in the day. Said Gallagher, therefore, appears to be guilty of the following misstatements of fact: (1) That he was acting under duress; (2) that the funds had already
190 been paid out; (3) that the funds had been withdrawn from the Registry of the Court under the original order of this Court and that no new order had been obtained; (4) that Aron had rendered no service in obtaining the payment of \$27,000.00 on the award to Mrs. Drier; (5) by inserting in the memorandum filed in support of the present motion for summary judgment and the memorandum in opposition to the motion of this deponent to refer this cause to the Auditor a purported quotation from the opinion of the United States Court of Appeals in this cause, wherein he had inserted, without explanation that it was not included in the opinion of the Court of Appeals, the statement (meaning of course any valid rights which the 1945 agreement gave him), the effect of which was to

change the meaning of the language of the Court of Appeals to fit the interpretation of said Gallagher and contrary to its true meaning and intent.

The final link in the chain of evidence is the present motion for summary judgment to obtain, without trial or hearing, the additional \$27,000.00, in connection with which there exists another link in the chain of evidence; namely, the extraordinary efforts made, through the official intervention of United States Senator Flanders by his personal call at the Treasury department demanding that this \$27,000 be paid direct to Mrs. Drier and not into the Registry of this Court, which fortunately for this department was disregarded by officials of the United States Treasury.

The arguments presented by Messrs. Gallagher, Hendry and Anderson in support of their motion for summary judgment show that they are endeavoring to deprive this deponent of his unassailable rights in the fund. It is argued that this deponent can not claim any part of the fund because his services were of a lobbying nature and in stating this point, they go to the length of changing the meaning of the language of the Court of Appeals in the manner above shown. The fallacy of their argument is apparent. Except by dictum in the opinion of the Court of Appeals, there has been no judicial decision that the deponent's services fall within the interdiction of lobbying contracts and there is overwhelming authority to the contrary, for
 191 the simple reason that the legislation procured by this deponent did not seek "favor" from the Congress and did not take anything out of the United States Treasury, but was merely in aid of collecting a debt which the German Government had agreed to pay, and was analogous to an equitable attachment from the only tribunal having sovereign jurisdiction. But all this is completely irrelevant. This deponent's right to the money in the Re-

gistry of this Court arises from the settlement agreement and re-employment contract, made in 1945, and approved by this Court, the United States Court of Appeals for the District of Columbia, and indirectly by the United States Supreme Court by the denial of certiorari from the decision of the Court of Appeals. In the very action which this agreement settled, Mrs. Drier had contended that this deponent could not recover because of the alleged lobbying nature of his services. Surely when two litigants settle a case, it is not in the power of the court to dessicate that agreement of settlement, after it has been judicially sanctioned by the highest judicial authority and hold that a defense pleaded in the settled case can be availed of in resisting payment under the settlement made. Moreover, on the faith of that agreement, this deponent has rendered services of the most intricate kind and highest order in helping to bring about the very payment of the \$27,000 and in the conduct of an action under the Federal Tort Claims Act, which, if successful, will result in the payment to the plaintiff, Mrs. Drier, of the several hundred thousand dollars still due on her award of the Mixed Claims Commission, United States and Germany. If more need be said on the fallacious argument for the motion for judgment, the simple fact remains that the \$27,000.00 was not paid into the Registry of the Court under the authority of Private Law 509 of the 76th Congress, but under Public Law 375 of the 80th Congress, with the passage of which said counsel for plaintiff assert deponent's services had nothing to do. The historical facts are to the contrary, as shown by the annexed communications with the Under Secretary of the Treasury as early as May, 1945, and constituting the first action taken by deponent on behalf of Mrs. Drier after yielding to the importunities of herself and her son

192 to resume his services as her counsel, but with the express limitation stated in the said agreement of

May 2, 1945, confining the relation of attorney and client to the single matter of the balance due on the awards of the Mixed Claims Commission.

The 1945 agreement had four aspects: (1) To procure some cash for Mrs. Drier, who stated she was without funds; (2) at Mrs. Drier's urgent request to get this deponent into action on her behalf in collecting the balance of her awards; (3) to provide a means by arbitration and audit to dispose of the existing action of this deponent against her for \$250,000.00 and disbursements of approximately \$25,000.00; and (4) to finance a Herculean effort to compel the United States under the newly enacted Federal Tort Claims Act to pay the balance, aggregating over \$100,000,000.00 due on the various awards of the Mixed Claims Commission, United States and Germany, from money and property now in the hands of the United States which belonged to Germany or German nationals. In conformity with this agreement of 1945, this deponent has rendered three years of highly specialized and successful services, and has paid out of his own pocket disbursements in litigation agreed to be paid out of the funds deposited in the Registry of this Court. He has received not a dollar to this moment for ten years services rendered prior to 1941, and most successfully rendered over a variety of matters in this country and abroad, of which his services in procuring the passage of Private Law 509 were only a part; or in reimbursement of thousands of dollars paid out by him for expenses in the rendition of those services. He has not received a dollar for services and substantial out of pocket disbursements since the re-retainer which he accepted in good faith in 1945 and voluntarily released half of the \$54,000.00 deposited in the Registry of this Court, to keep Mrs. Drier from destitution.

Upon this state of facts, Mrs. Drier, Mr. Gallagher and Mr. Hendry, with full knowledge thereof, contrary to the

decision of this Court, in violation of the agreement which this court had approved, having obtained \$36,000.00 from the funds in the custody of this Court, now seek to retain that and to take an additional \$27,000.00 from the
 193 funds in the Registry of this Court without affording this deponent a trial or hearing, by their motion for summary judgment.

Had the motion papers now before this Court for summary judgment correctly stated the situation, it would be at once apparent that as a matter of law, the court cannot consider the motion, much less grant judgment, because of the interests of third persons not parties to this action or before the Court. The agreement of May 2, 1945, creates specific rights and interests in such persons by the following language:

"The fund now deposited in the Registry of the Court shall be used by me in the following manner:

"One-third ($\frac{1}{3}$) thereof I shall retain and make use of for my personal needs and requirements as I see fit;

"One-third ($\frac{1}{3}$) thereof I shall use to buy up claims against you on the part of those who have intervened in the pending suit, or such other claims as you may designate, including the claims of your wife, and sister-in-law, for monies advanced to you since 1940, all in such amounts as shall be designated by you or by Court order. * * *".

The rights of such third persons are expressly recognized and sanctioned in these words of the Court's decision, and are entirely separate and distinct from the intervenors who have been excluded by the decision; namely,

"(4) The claims of the parties who have been interpleaded or have intervened, except in so far as their interests may appear in connection with the settlement between Drier and Aron, are denied."

It is specious to contend that when a fund of \$27,000.00 (deponent's share under the 1945 agreement) is diminished by \$9,000.00 that the rights of third parties do not exist because the \$18,000.00 not withdrawn equals the dollar amount in which third parties had an interest.

(S) HAROLD G. ARON.

Subscribed and sworn to before me this 29th day of October, 1948.

(S) ELIZABETH H. KREBS,
(Seal) *Notary Public, D. C.*

196 **Opposition to Motion of Harold G. Aron to Ad-
judge Plaintiff and Her Counsel in Contempt
and for Order Directing Them to Restore
Funds to Registry of Court**

There is no more merit to this motion than there was to Aron's motion to modify the final judgment in this case, which was argued before this Court on October 15, 1948, and denied. In argument of that motion Mr. Aron's attorney, Mr. Merrick, made the same representations as he is making in connection with this motion, namely, that Mrs. Drier's counsel were in contempt. In disposing of that motion the Court very properly recalled to Mr. Merrick's recollection facts which he should have remembered himself, namely, that when this Court's order was prepared in Chambers Mr. Merrick had made the same contention that he has made in these two current motions, namely, that Mr. Merrick then wanted the Court to direct Mrs. Drier's counsel, in her place, to carry out the terms of her agreement with Mr. Aron; that the Court felt it was without authority to do so "and all I could do would be to direct the

Clerk, which we always do, to pay the money to counsel of record, and she (Mrs. Drier) then was to carry out the agreement she had made, but not under the supervision of the Court. I didn't think I had any power and I don't think I now have,—certainly I have less now than I had then,—to direct that this agreement be carried out under the supervision of the Court. I don't see any authority in this Court to do that."

197 It is inconceivable that Mr. Merrick would persist in motions of the character of the motion to modify the final judgment and of this current motion, knowing full well, as he must, that he made this same contention when the original order was prepared in Chambers, was flatly advised by Mr. Gallagher that he would not be in any way responsible for the carrying out by Mrs. Drier of her contract with Aron and that the Court's view that it was without authority to compel the assumption of such a burden by Mr. Gallagher.

Aron is further critical of Mrs. Drier and her counsel because of a motion for summary judgment that has recently been filed by Mrs. Drier directed to the additional Twenty-seven Thousand Dollars (\$27,000.00) which has been paid into the Registry of the Court by the Treasury Department. Without attempting to argue the merits of that motion here, it can be said with confidence that if the motion has no merit the Court will deny it at the proper time, but the filing of the motion certainly ought not to attach any opprobrium to Mrs. Drier or her counsel. The allegations of Mr. Aron's affidavit are repetitious and immaterial and do not require detailed reply.

(S) BERNARD J. GALLAGHER

(S) M. WALTON HENDRY

200

Washington, D. C.

Wednesday, December 8, 1948.

Deposition of HONORABLE HENRY A. SCHWEINHAUT, a Judge of the United States District Court for the District of Columbia, called for examination by counsel for Defendant Harold G. Aron, pursuant to notice attached to the Court copy of this deposition, at the District Court House, beginning at 3:30 p. m., before Lucius V. Friedli, a notary public in and for the District of Columbia, when were present on behalf of the respective parties:

BERNARD J. GALLAGHER, Esq., and J. ROY THOMPSON, JR., Esq., for the plaintiff.

RICHARD L. MERRICK, Esq., for Defendant Harold G. Aron.

201 Thereupon

Honorable Henry A. Schweinhaut was called for examination by counsel for Defendant Harold G. Aron, and after having been first duly sworn by the notary was examined and testified as follows:

Examination by Mr. Merrick:

Q. Your Honor, will you please state your full name?

A. Henry A. Schweinhaut.

Q. Your occupation is that of Judge of the United States District Court for the District of Columbia? A. That is right.

Q. I believe that you were the Judge who heard the original motion for summary judgment in this case during 1946? A. That is correct.

Q. Inviting your attention to the date of June 30, 1948, when a check for certain funds in the Registry of the Court was issued, do you recall who appeared before you with respect to that withdrawal? A. No, I do not. What usually happens is that after the order is signed by the

Court, the clerk draws the checks and brings them up to the Judge attached to the order and the Judge signs the checks. Sometimes counsel bring them up. I have no recollection whatever of what happened in this case.

* * *

210 EXAMINATION by Mr. Gallagher:

Q. Is it not a fact, your Honor, that the order filed June 30, 1948, which is the order of affirmance which directed the Clerk to make payment of the funds pursuant to your Honor's order of November 15, 1946, is simply a *pro forma* order on which notice to counsel was not required? A. Well, yes, except that it is my custom, from which I obviously departed in this case, to require that the orders that I sign be submitted to the other side and to have noted on them either "I consent," or "No objection to form," or "Seen," or something of that sort. That is my custom. However, it is clear that I did not require any such notations with the signatures of counsel here, because none are on here. Why, I do not know.

Q. Of course, your Honor approved the order of June 30, 1948, knowing that notice had not been sent to
211 any of the other counsel in the case and of course, as you say, without any representations having been made by me or by Mr. Hendry or by whomever handed the order to you for signature that notice had been given to any other counsel? A. I just do not have any recollection about it, but it is my assumption that there were no representations of any kind. I was about to say that I would have remembered them, but I do not know whether I would have or not. I just do not know.

Q. It is a fact, is it not, sir, that the order of June 30, 1948, is actually a *pro forma* order? A. Yes, which may account, incidentally, for my not having required the notation "I consent" or "Seen" on it.

Q. Does your Honor recall a conversation with me, a telephone conversation with me, in which I discussed with you the necessity of notifying other counsel before presenting that order of June 30, 1948? A. I do not. Was there such a conversation?

Q. Yes, there was. A. Can you tell me about it? That might bring it back to me.

Q. Yes, I can. It happened this way: After the Supreme Court had denied certiorari we were going,
212 of course, to present an order directing that the funds be paid as your Honor's order of November 15, 1946, required, and Mr. Thompson checked with Harry Hull about it, asking Harry whether it was necessary to file a motion and whether Harry thought—

Mr. Merrick: I object to any hearsay.

A. Whether he thought it was necessary to file a motion?

Q. Yes. Then I called your Honor for the purpose of asking you when would be a suitable time for you to hear such a motion, and your response was that you did not see why a motion had to be filed, that it was simply a *pro forma* order, and that we only needed to present the order. A. I do not remember that, but that is precisely what I would have said under normal circumstances.

Q. Then, further, you said that you would speak to Harry Hull about it, and your Honor called me back, which was either the same day or the next day, and said that a motion is not necessary, to simply send down an order, which we did. A. I do not remember anything at all about that, but I would have taken that position, I am certain, for the reason that this order had to be signed as a necessity—

Q. *Pro forma*? A. *Pro forma*; and had the suggestion of a motion been made I probably would have called
213 Harry Hull to find out why it was necessary to do it.

But I do not remember that conversation, unfortunately.

* * *

220

Washington, D. C.,
Thursday, December 9, 1948.

Deposition of M. WALTON HENDRY, called for examination by counsel for Defendant Harold G. Aron, pursuant to notice, copy of which is attached to the court copy of this deposition, at Suite 707, 1025 Vermont Avenue, N. W., beginning at 2:00 p. m., before David Spatzer, a notary public in and for the District of Columbia, when were present on behalf of the respective parties:

BERNARD J. GALLAGHER, Esq., for the plaintiff.

RICHARD L. MERRICK, Esq., for Defendant Aron.

* * *

221 Thereupon—**M. Walton Hendry** was called for examination by counsel for Defendant Aron, and after having been sworn by the notary, was examined and testified as follows:

Examination by Mr. Merrick:

Q. Your full name is M. Walton Hendry? A. Correct.

Q. And you are a member of the Bar of the District of Columbia? A. Correct.

Q. You are one of the persons named in the motion filed herein to adjudge the plaintiff and her counsel in contempt; is that correct? A. Correct.

Q. Inviting your attention to the date of June 30, 1948, and perhaps the day before, did you have anything to do with the preparation and presentation to Judge Schweinhaut of the order signed by him on June 30, 1948, directing the withdrawal from the Registry of the Court the sum of \$31,331.55? A. I collaborated with counsel in

222 preparation of the order.

.

Q. By counsel, do you mean Mr. Gallagher? A. Yes, sir. I had nothing to do with the presentation of the order.

Q. Did you talk to Judge Schweinhaut about it either personally or over the telephone? A. No.

Q. Do you know who did present the order? A. No.

Q. Do you know whether or not it was Mr. Thompson? A. I don't know.

Q. Do you know whether or not it was Mr. Gallagher? A. I don't know.

Q. Were you in the office on June 30, 1948? A. I don't remember.

* * *

223 Q. Did anybody from the Court House, to your knowledge, call you about this order of June 30, 1948?

A. Not that I remember. No one called me from the Court House.

Q. No one called you and told you the check was ready? A. I don't remember. There might have been. I don't say they didn't. I don't remember whether they notified me personally. They might have notified the office.

Q. Do you know who actually went down to the Court and received the check? A. Yes. I went down and got the check.

Q. And was that on June 30, 1948? A. I don't recall the date. I know it was after the order was signed that I went down and got the check.

Q. Do you recall the hour of the day that you
224 went down to get the check? A. No, I do not.

Q. It would be before 4:00 o'clock, of course, because the Court closes at 4:00? A. Yes.

Q. Then you don't recall whether it was on the 30th of June or the 1st of July that you received the check? A. I don't recall.

Q. Is there any way you could refresh your recollection, to your knowledge, now? A. Not that I know of.

* * *

225 By Mr. Merrick:

Q. According to your best recollection, then, you received the check from the clerk's office? A. That is right.

226 Q. What disposition did you make of it after receiving it? A. I brought it back to the office and put it in the office safe.

Q. Then do you know what happened to it after that? A. I do not.

Q. Did you take it out of the safe? A. I did not.

Q. Do you know who did? A. I do not know.

* * *

235

Order

Upon consideration of the motion of Harold G. Aron, defendant No. 2 herein, to adjudge plaintiff and her counsel in contempt and for order directing them to restore funds to Registry of the Court, the Court having heard argument upon said motion, it is by the Court this 18th day of March, 1949,

ORDERED That the said motion be and the same is hereby denied.

(S) BEN MOORE,
Judge.

Seen

(S) RICHARD L. MERRICK,
Atty. for Deft. No. 2, H. G. Aron.

**236 Counterclaim of Defendant No. 2, Harold G. Aron,
 Against the Plaintiff, Katharine M. Drier.**

FIRST COUNT.

For a first cause of action and counterclaim against the plaintiff, Katharine M. Drier, defendant No. 2, Harold G. Aron, states as follows:

1. After the commencement of this action and while the same was pending, the plaintiff, Katharine M. Drier, and this defendant, Harold G. Aron, entered into an agreement, dated May 2, 1945, for the purpose of settling and composing differences then existing between them, a copy of which is hereto annexed as a part hereof, marked Exhibit A.

2. Upon the motion of plaintiff herein, concurred in by this defendant, the said agreement of May 2, 1945, was approved by this Court in its judgment of November 15, 1946.

3. Said agreement of May 2, 1945, provided, among other things, that the plaintiff would use one-third of the fund of \$54,497.32 then on deposit in the registry of this Court, or the sum of \$18,165.77, to buy up claims against this defendant on the part of those who had intervened in this action or such other claims as this defendant might designate, including those of this defendant's wife and sister-in-law for money advanced this defendant since 1940, in such amounts as should be designated by this defendant or by Court order; and said agreement further provided that one-third of said fund of \$54,497.32, or the further
237 sum of \$18,165.77, was to be used and paid out to aid
 in the prosecution of certain litigation on behalf of
 plaintiff, as shown by Exhibit A hereto.

4. On or about June 30, 1948, the plaintiff, having previously drawn out \$5,000.00, without notice to this defend-

ant, withdrew from the registry of this Court the sum of \$31,018.32, immediately carried away the same from the District of Columbia and the jurisdiction of this Court, and ever since has refused and now refuses to use any part thereof for the purposes provided for in her said agreement of May 2, 1945, except for her own personal benefit, and in that manner plaintiff has breached and broken the said agreement.

WHEREFORE, defendant No. 2, Harold G. Aron, demands judgment against the plaintiff, Katherine M. Drier, for \$18,165.77, with interest thereon from June 30, 1948, besides costs.

SECOND COUNT.

For a second, further and separate cause of action and counterclaim against the plaintiff, defendant No. 2 states as follows:

1. He adopts by reference the allegations of Paragraph 1 of the First Count of this Counterclaim and prays that they be read and considered as a part hereof to the same extent as if set forth in full herein.

2. He adopts by reference the allegations of Paragraph 2 of the First Count of this Counterclaim and prays that they be read and considered as a part hereof to the same extent as if set forth in full herein.

3. Said agreement of May 2, 1945, provided, among other things, that on all future amounts recovered under awards to the plaintiff made by the Mixed Claims Commission, United States and Germany, or under Private Law No. 509, 76th Congress, approved July 19, 1940, this defendant would receive thirty per cent of such amounts as payment for his legal services rendered therein to or for the plaintiff.

4. About September 25, 1948, the defendant, the Secretary of the Treasury, deposited in the registry of this Court, the further sum of \$27,932.51 as a payment on said awards to plaintiff made by the Mixed Claims Commission, United States and Germany, and under the said Private Law No. 509, whereupon, under the said terms of the agreement of May 2, 1945, this defendant became, was and still is entitled to receive thirty per cent thereof, or the sum of \$8,379.75, but the plaintiff has refused and now refuses to pay or cause to be paid to this defendant the said sum or any part thereof, but on the contrary claims to be entitled to the whole of said fund so deposited in the registry of this Court on or about September 25, 1948, as aforesaid.

WHEREFORE, defendant No. 2, Harold G. Aron, demands judgment against the plaintiff, Katharine M. Drier, for the sum of \$8,379.75, with interest thereon from September 25, 1948, besides costs.

THIRD COUNT.

For a third, further and separate cause of action and counterclaim against the plaintiff, defendant No. 2 states as follows:

1. He adopts by reference the allegations of Paragraph 1 of the First Count of this Counterclaim and prays that they be read and considered to the same extent as if set forth in full herein.

2. He adopts by reference the allegations of Paragraph 2 of the First Count of This Counterclaim and prays that they be read and considered to the same extent as if set forth in full herein.

3. He adopts by reference the allegations of Paragraph 3 of the Second Count of this Counterclaim and prays that

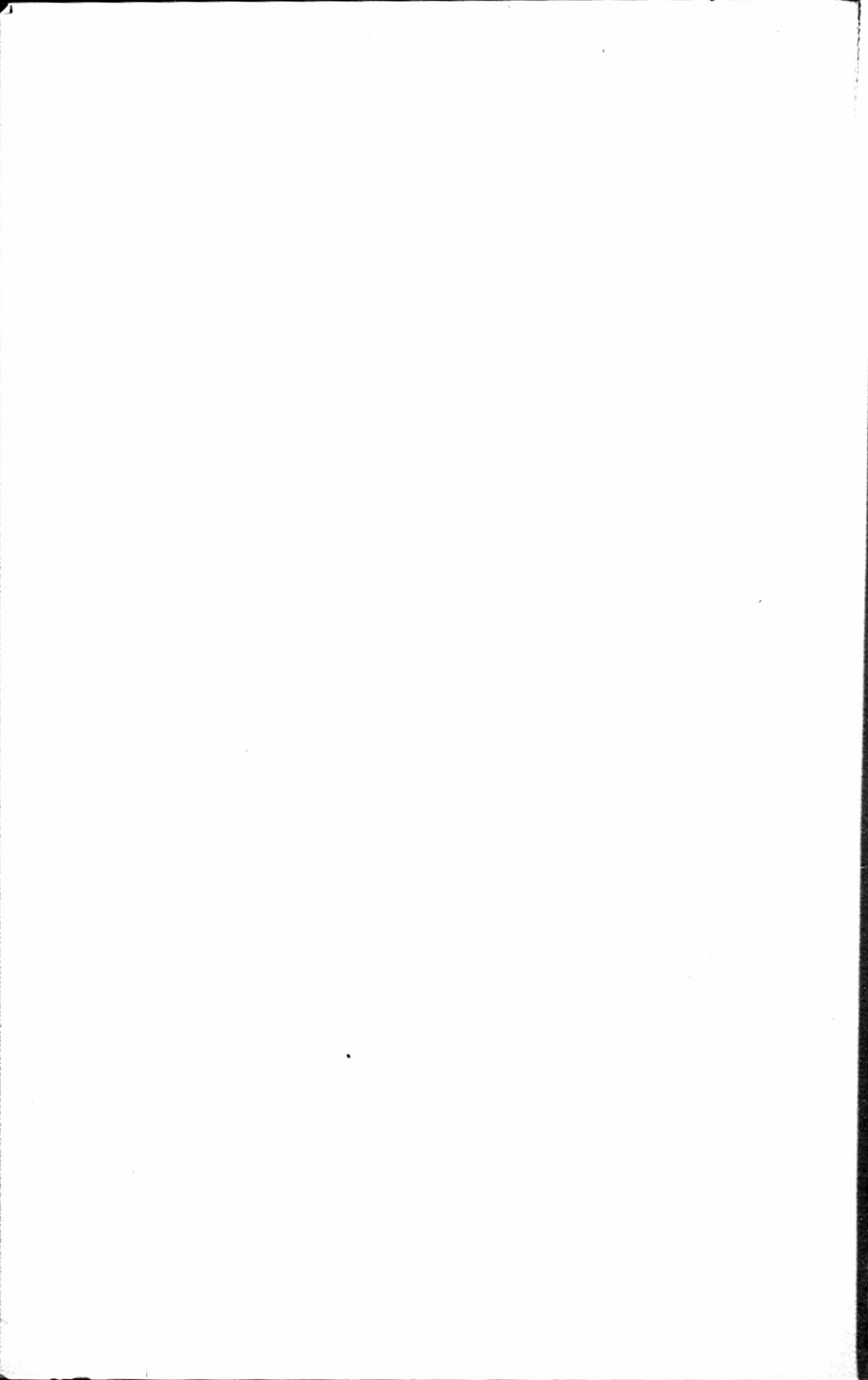
they be read and considered to the same extent as if set forth in full herein.

4. The defendant, the Secretary of the Treasury, now has ready for payment and is about to deposit in the registry of this Court the further sum of, to-wit, \$11,000.00 to apply on said awards to plaintiff made by the Mixed Claims Commission, United States and Germany, and under said

Private Law No. 509, whereupon, in accordance with
239 the terms of the agreement of May 2, 1945, this defendant became and still is entitled to receive thirty per cent thereof, or the sum of, to-wit, \$3,300.00, but the plaintiff has refused and now refuses to pay or cause to be paid to this defendant the said sum or any part thereof, but on the contrary claims to be the owner of the whole of said fund.

WHEREFORE, defendant No. 2, Harold G. Aron, demands judgment against the plaintiff, Katherine M. Drier, for the sum of, to-wit, \$3,300.00, with interest and costs.

RICHARD L. MERRICK,
1025 Vermont Ave., N. W.,
Washington 5, D. C.,
Attorney for Defendant No. 2,
Harold G. Aron.



APPENDIX FOR APPELLEE.

Excerpts from Proceedings of October 15, 1948.

* * * * *

135 Your Honor probably will recall the meeting we had in Your Honor's chambers, about the phraseology of that judgment. I was present. Mr. Gallagher was present. Counsel for Mrs. Ritchie, I think, was present, one Henry J. Quinn,—and, I can't recall whether any other counsel were there or not.

136 Discussion arose as to how the phraseology of that final order should be made, and at my suggestion, Mr. Galloway's name was left out because he was no longer counsel.

* * * * *

142 The Supreme Court of the United States has always held, if Your Honor, please, that any officer of a Court, attorney, or clerk, or any litigant who, know-

143 ingly aids and assists in the removal of the subject matter of litigation prior to a final order, from the jurisdiction of the Court, is in contempt and may be punished.

* * * * *

* * * and I say it not as a threat but merely as a matter of prediction: that this episode will not end with this hearing, I don't think.

I maintain, if Your Honor please, that they are further in contempt of this Court by this circumstance:

* * * * *

144 I maintain, if Your Honor pleases, that we are entitled to an order modifying this judgment, nunc pro tunc, as of July 1st, 1948, when the money was still in

the hands of Mr. Gallagher and Mrs. Drier,—in order that our interests may be protected.

The Court: In what respect would you have the Court modify the judgment?

Mr. Merrick: I would have the Court modify it in such respect that it would carry out the terms of that agreement.

The Court: Then, does it not come down to this:

Your present motion is really a reiteration of the position you took at the time I directed the Clerk to pay the money to Mr. Gallagher. Your position then was
 145 that I should require as I recall it, anyway,—require Mr. Gallagher to carry out for me, so to speak, the terms of the settlement agreement.

Mr. Merrick: He should—or should not?

The Court: Should.

What you really wanted me to do then, and now, was to direct Mr. Gallagher, in the place, or instead of Mrs. Drier, to carry out the terms of her agreement.

Now, there was no motion, and it seems to me that I could only have done that by the appointment of a receiver, or the appointment of a trustee, assuming I had any power at all, to do it, which I thought I did not,—there was no motion for a receivership. There was no motion for a trusteeship. It was simply more or less a casual conversation. It certainly originated thus, in my chambers, that you were looking to him, Mr. Gallagher, to see that this agreement was carried out.

Mr. Merrick: That is right.

The Court: It is my impression I felt that I had no authority to do it, and certainly I had not been called upon to do it by any formal motion or petition in the cause,—

Mr. Merrick: I thought—

The Court: —and that all I could do would be to direct the Clerk, which we always do, to pay the money to counsel of record, and she then was to carry out the agreement she had made, but not under the supervision of the Court.

I didn't think I had any power, and I don't think
 146 I now have,—certainly I have less now than I had
 then,—to direct that this agreement be carried out
 under the supervision of the Court.

I don't see any authority in this Court to do that.

* * * * *

147 Mr. Gallagher: When we were preparing the
 terms of this order, Mr. Merrick sat at my right
 148 hand, Mr. Hendry and Mr. Quinn sat to my left, and
 Mr. Newman was there representing the Department
 of Justice, and interested in the Government's tax claim
 there,—and he made the same proposal, the very same
 proposition there that he has made in front of Your Honor,
 namely, that I be responsible to Mr. Aron for the per-
 formance of Mrs. Drier's contract with Mr. Aron; and, I
 could not have been more categorical in denying that I
 would have anything to do with it. I was not going to be
 responsible for Mrs. Drier's performance of her contract
 with Mr. Aron,—I would have nothing to do with it, and
 I so stated.

The Court: And I did not feel that I had any power to
 direct you to.

Mr. Gallagher: Exactly,—and I went on to say that I
 wanted to be included in the order for the sole purpose of
 protecting my fee, and Your Honor made some favorable
 comment about that, I will not try to put words in your
 mouth, but you did say something, and that was the end
 of it. The terms of the order were approved. Mr. Mer-
 rick sat there and collaborated in the preparation of the
 order just as I did, and when the order went up,—that is
 when we prevailed in this Court, and Betsie Ritchie and
 Aron took the case on appeal to the Circuit Court and Your
 Honor's order was affirmed there, and the Betsie Ritchie
 petition for rehearing,—Mr. Aron filed a memorandum in
 opposition to her petition for rehearing.

Then, when they took the case, when we prevailed
 149 in the Circuit Court and they took the case up to

the Supreme Court, Mr. Aron filed a brief in opposition to the petition for certiorari.

So, all the way through, he has fought just as hard as we have to have Your Honor's order affirmed.

Now, his complaint is not that I didn't do what the order required me to do. He wants another order, for Your Honor to make a new order which, instead of paying the \$36,000 balance which it was at that time, to Mrs. Drier, without any strings attached to me,—now he wants Your Honor to make another order which will pay \$18,000 of that \$36,000 to a trustee to be named by the Court, to be disbursed according to the settlement agreement.

It all just doesn't make sense to me,—this business of charging me, as an officer of the Court. I have no obligation whatever to Mr. Aron. I have no obligation whatever to King & King. My only obligation was to Mrs. Drier, who was my client, and under the order of the Court I had no choice whatever but to pay to her the funds that came into my hands after I had deducted my fee, which I did do, instantly.

I don't see how I could have done any more, or how I was responsible to do any more.

The Court: When did the Supreme Court of the United States deny certiorari?

Mr. Merrick: June 16th, if I remember rightly, or
150 some where along there,—the 21st.

I recited it in my memorandum of authorities.

The Court: Do you want to say anything?

Mr. Rhodes: No, Your Honor.

Mr. Gallagher: I have one more comment to make about King & King, before Mr. Rhodes speaks.

Mr. Gaskins, of King & King, called me before we got this money, and reminded me that Mrs. Drier owed King & King \$6,000 for this tax case; and, he told me that he had talked with her about paying it and asked her to come down to his office to talk to him, and I said "I can't do anything about it."

He then wrote me a letter and asked me if I would take it up and ask her if she would authorize me to pay it and I did do that, and she declined to allow me to do it. She said she wanted the money and would attend to it herself.

Again,—I cannot be responsible for taking money out of her pocket to pay King & King, or anybody else; and if I hadn't paid her this fund as soon as it came into my hands, I probably would have been faced with a lawsuit by her for failure to discharge my obligation to her.

* * * * *

152 Since inception of the case, there has recently been deposited another 26 or 28 thousand dollars in the Registry, in addition to the fund that was originally in the Registry.

The Court: Which is also going to Mrs. Drier?

Mr. Gallagher: It is still in the Registry.

The Court: Is that destined to Mrs. Drier?

Mr. Gallagher: Yes, sir.

* * * * *

153 Mr. Merrick: In other words, Your Honor is going to approve what these counsel did in assisting the litigant to get the money out of the jurisdiction of the Court?

The Court: I am denying the motion.

Excerpts from Proceedings March 14th and 15th, 1949.

On the following Monday, which was November 18, 1946 I wrote this letter to Mr. Merrick:

Mr. Richard L. Merrick
Woodward Building
Washington 5, D. C.

Dear Mr. Merrick:

Reference is made to the conference in Judge Schweinhaut's office on Friday afternoon, November 15, 1946, concerning the signing of the order in the matter of Drier v. Morgenthau.

You made the contention there that if the two-thirds of the money which the court ordered to be paid to my client is paid to her and to me as her attorney I would be responsible for carrying out the provisions of the settlement agreement between Mrs. Drier and your client, Mr. Aron.

You will recall that I immediately made an issue of your contention in the presence of Judge Schweinhaut and all counsel, pointing out that in having the money paid to Mrs. Drier and to me as her attorney I was only protecting my fee, but I specifically disclaimed any responsibility for the performance of the provisions of the settlement agreement.

I am not a party to the settlement agreement between Mr. Aron and my client. As I stated to you the proposals in that settlement agreement were formulated by Mr. Aron. I have no responsibility for their authorship nor their enforcement and I now specifically decline to accept any responsibility for the performance by my client of any of the undertakings of this agreement. This is not to say that I have any knowledge that she will not perform her contract; it is simply to advise you categorically that the performance of the agreement is her responsibility and not mine.

Mr. Merrick, I am sure, received the original of that letter. Mr. Merrick has the original there.

Now, Your Honor, I would like to read Mr. Merrick's reply to that letter:

Washington, D. C.,
November 21, 1946.

Bernard J. Gallagher, Esq.,
Union Trust Building,
Washington 5, D. C.

Dear Mr. Gallagher:

I have your letter of the 18th in the Drier matter, and have noted the contents carefully. I am sorry I caused you to have to write another letter. However, the wording of your proposed order, namely, "In conformity with this agreement of May 2, 1945", etc., created in my mind a situation in which you might meet with just what I pointed out in court; namely, a claim that you had assumed responsibility for seeing to the application of the "war chest" "in conformity with this agreement." However, the new draft of order, a copy of which I have received from Mr. Justice Schweinhaut, eliminates the provision referred to above, and, I think, imposes no burden or obligation upon you other than to pay the money over to your client.

That is Mr. Merrick, the gentleman who has asked to have me cited in contempt.

Mr. Merrick: Read the rest of it.

Mr. Gallagher: All right.

When the funds are turned over to you and Mrs. Drier, it seems to me she will be entitled to use right away, if she so desires, \$300.00 per month beginning May 2, 1945, a period of eighteen months to the present month, or some \$5,400.00. If that is true, Aron would seem to be entitled to receive the same lump sum amount. As you know, Mr. Galloway and I are entitled to a fee. I am wondering, therefore, if you would be willing to get Mrs. Drier's permission to pay over to Aron and to me jointly the sum mentioned. In that way, my fee and that of Mr. Galloway would be protected, or, if you desire, the check could be made payable to all three.

Does that indicate they thought I had the power to take part of this \$31,000.00 eventually paid to me and give it to them? Certainly not.

May I pass those letters up to Your Honor?

(Handing document to the Court)

BRIEF FOR APPELLEES

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

No. 10288

HAROLD G. ARON, *Appellant*,

v.

KATHARINE M. DRIER, BERNARD J. GALLAGHER,
M. WALTON HENDRY, *Appellees*.

Appeal From the United States District Court for the
District of Columbia.

BERNARD J. GALLAGHER,
*Attorney for Katharine M. Drier
and in his Own Behalf.*

M. WALTON HENDRY,
*Attorney for Katharine M. Drier
and in his Own Behalf.*

J. ROY THOMPSON, JR.,
*Attorney for Appellees,
Union Trust Building,
Washington, D. C.*

United States Court of Appeals
For the
District of Columbia Circuit

LIB DEC 12 1949

Joseph W. Stewart
CLERK

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 10,288.

HAROLD G. ARON, *Appellant*,

v.

KATHARINE M. DRIER, BERNARD J. GALLAGHER,
M. WALTON HENDRY, *Appellees*.

Appeal From the United States District Court for the
District of Columbia.

BRIEF ON BEHALF OF APPELLEES.

STATEMENT OF THE CASE.

The appellees in this appeal are accused of contempt of Court because they obeyed and carried out the final order of affirmance of the Court below upon the mandate of this Court, while that order of affirmance was still in effect. *Ritchie v. Drier*, 83 App. D. C. 16, 165 Fed. (2d) 238, cert. den. 68 Supreme Court 1518, 334 U. S. 860, 92 L. Ed. Ad. Op. 1481.

The order of the Court below, dated November 15, 1946, provided that of the sum of \$54,497.32, deposited in the

Registry of the Court by the Secretary of the Treasury, the sum of \$36,331.55, less the Clerk's fee incident thereto, shall be paid to the plaintiff "Katharine M. Drier and to Bernard J. Gallagher, Esq., as her attorney, jointly," and that the balance of \$18,165.77 "is to remain in the Registry of this Court, pending further order of this Court." One of the intervenors, Betsy Ritchie, the first wife of appellant herein, Aron, appealed from the aforesaid order of the District Court, to this Court. Appellant, Aron, did not appeal this order and, in fact, joined appellee herein in seeking an affirmance of the order of the Court below.

This Court affirmed the order of the Court below on the 8th day of December, 1947. Betsy Ritchie applied for writ of certiorari to the Supreme Court of the United States. Appellant herein filed in the Supreme Court of the United States its opposition to the application for writ of certiorari, as did appellee Drier. The Supreme Court of the United States on June 21, 1948, denied Betsy Ritchie's request for certiorari. This Court on June 24, 1948, handed down its mandate to the Court below, affirming the order of the Court below. On June 30, 1948, Judge H. A. Schweinhaut signed an order of affirmance, pursuant to the mandate of this Court in this case. The order of affirmance provided:

"that the Clerk of the United States District Court for the District of Columbia be, and he is hereby, authorized and directed to release and pay forthwith to Katharine M. Drier and Bernard J. Gallagher, as her attorney, jointly, the sum of Thirty-one Thousand Three Hundred Thirty-one Dollars and Fifty-five Cents (\$31,331.55), being the balance ordered to be paid Katharine M. Drier in the order of this Court dated November 15, 1946, filed November 18, 1946, less the Clerk's fee incident thereto, * * *" (App. 54)¹

¹ By consent of all parties, while the case was pending in this Court, \$5,000.00 was authorized to be withdrawn by Katharine M. Drier, out of the sum of \$36,331.55, which was due her under the order of the Court below, dated November 15, 1946, leaving the balance due her under that order, of \$31,331.55.

On June 30, 1948, Judge H. A. Schweinhaut signed a check pursuant to his order of affirmance, in the amount of \$31,331.55, payable to Katharine M. Drier and Bernard J. Gallagher, as her attorney, jointly.

This check was delivered on June 30, 1948, to appellees, was cashed by them and, except for counsel's fee, the proceeds were turned over to Katharine M. Drier. On July 1, 1948, appellant filed in the Court below a paper called, "Motion for Order Modifying Final Judgment as to Disposition of Funds Deposited in Registry of Court." No writ of supersedeas or other staying order was ever applied for, or granted by the Court below. Appellant's motion for order modifying final judgment moved the Court below to appoint Trustee or Trustees, in lieu of Katharine M. Drier and Bernard J. Gallagher, named in the order of affirmance of the Court below as the proper parties to receive said funds. This motion further requested a modification of the order of affirmance by a direction to the Trustees to be appointed by the Court to so distribute the funds in question as to carry out the terms of an agreement which Katharine M. Drier had entered into with the appellant May 2, 1945, or prior to the original order of the Court below, dated November 15, 1946.

This motion for order modifying final judgment was argued before Judge Schweinhaut and was overruled on October 20, 1948 (App. 54). In the hearing on this Motion before Judge Schweinhaut on October 15, 1948, Appellant Aron, through his attorney, Merrick, in support of his argument on his motion to modify the final judgment in this case, stated (App. 77):

"The Supreme Court of the United States has always held, if your Honor please, that any officer of a Court, attorney, or clerk, or any litigant who, knowingly aids and assists in the removal of the subject matter of litigation *prior to final order*, from the juris-

diction of the Court, is in contempt and may be punished.

* * * * *

I maintain, if your Honor please, that they are further in contempt of this Court by these circumstances:

* * * * *

Mrs. Drier was permitted to leave this jurisdiction with \$31,000.00, less whatever the amount of their fee was,—I don't know the amount of that, so that she can not now be reached by the processes of this Court. She has gone up into Connecticut somewhere and we are just helpless." (Emphasis added)

At this same hearing, the following colloquy, also, took place between appellant's counsel and Judge Schweinhaut (App. 81):

"Mr. Merrick: In other words, Your Honor is going to approve what these counsel did in assisting the litigant to get the money out of the jurisdiction of the Court?

The Court: I am denying the motion."

From the above, it will be seen that appellant Aron, at the time he argued his motion to modify the final judgment in this case, made the same contentions respecting appellee's alleged contempt as is now made here and argued and charged in open Court before Judge Schweinhaut, in support of his motion, that appellees were in contempt. At this time he uttered a threat, which he preferred to call a prediction, to the effect that if he didn't get his way, "* * * * * this episode will not end with this hearing, I don't think." (App. 77) Judge Schweinhaut found no merit in the appellant Aron's motion or charges of contempt and denied the motion.

Appellant Aron took no appeal from the refusal of Judge Schweinhaut to sustain his charge of contempt or from his final order overruling his motion. True to his "prediction", however, uttered before Judge Schweinhaut, Aron then filed his motion to have appellees declared in contempt and to require them to restore to the Registry of the Court

the sum of money paid out under the order of affirmance. That motion was argued before Judge Ben Moore, a visiting Judge who, though he did not have Judge Schweinhaut's intimate knowledge of the facts and the background of the case, nevertheless saw no merit to Aron's motion and denied it. This appeal is from Judge Moore's order denying Aron's motion to hold appellees in contempt.

JURISDICTION.

It is believed that the jurisdiction of this Court to hear and determine this case is settled by the case of *Penfield v. Securities and Exchange Commission*, 67 S. Ct. 918, 330 U. S. 585, 591, 91 L. ed. 1117, 1123.¹

STATUTE INVOLVED.

Section 385 of Title 28, United States Code is as follows:

385. (Judicial Code, section 268.) Administration of oaths; contempts.—

The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transaction, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (R. S. § 725; Mar. 3, 1911, c. 231, § 268, 36 Stat. 1163.)

¹ Whether the order appealed from in this case is a final or an interlocutory order is not free from doubt. Cf. *Bessette v. W. B. Conkey Company*, 24 S. Ct. 665, 194 U. S. 324, 48 L. ed. 997; *Re Merchants Stock and Grain Company*, 32 S. Ct. 339, 223 U. S. 639, 56 L. ed. 584; *Fox v. Capital Company*, 57 S. Ct. 57, 299 U. S. 105, 81 L. ed. 67. Since the appeal on the pending motion both appellant and appellee Drier have filed motions for summary judgment, making claims to the funds paid into the Registry of the Court below since November 15, 1946. These motions have not yet been heard. The purpose of this footnote is not to cast doubt upon the jurisdiction of this Court to hear and determine this case on the merits, but is inserted for the purpose of full disclosure of the status of the case. Appellees are anxious that the matter be disposed of here and now and for all time on the merits.

STATEMENT OF POINTS.

- (1) Section 385, Title 28, U. S. C. is controlling herein.
- (2) The Court below did not err in overruling the motion of appellant for an order adjudging appellees in contempt of Court and requiring them to restore funds to the Registry of the Court below.

SUMMARY OF ARGUMENT.

1. Section 385, Title 28, U. S. Code controls:

- a. The power of District Courts to summarily punish for contempt is limited by the federal statute. The alleged acts of appellees are not punishable under the limitations set forth in the statute. The power of the District Court to so punish is limited to the following three classes of cases:

- (1) Misbehavior of any person in the presence of the Court or so near to the Court as to obstruct administration of justice.

There is no misbehavior in this case; and, in any event, the alleged misbehavior was not in the presence or proximity of the Court.

- (2) Misbehavior of officers of the Court in their official transactions.

There was no misbehavior of appellees as officers of the Court in their official transactions, either in the presence of or proximity of the Court.

- (3) Disobedience or resistance by any person to any lawful writ, process, order, rule, decree or command of the Court.

There was no such disobedience nor does appellant allege such disobedience of the appellees. Appellees obeyed an order of the Court below on the mandate of this Court.

2. The motion of appellant to modify the final judgment was frivolous. It did not stay appellees from acting in accordance with the order of affirmance. The Court below was without jurisdiction or power to grant this motion, since only this Court had the right to change its mandate. Therefore, appellees were not required to delay compliance with the order of affirmance pending action by the Court below on the motion to modify the final judgment.
3. Appellant's charge of contempt is barred by his failure to appeal from the decision of Judge Schweinhaut, entered October 20, 1948. Appellant charged before Judge Schweinhaut, in support of his motion to modify the order of affirmance, that the appellees were in contempt of Court, alleging the same reasons now advanced in this appeal. No appeal was ever taken from the adverse decision of Judge Schweinhaut and the overruling of appellant's motion on the 20th day of October, 1948 (App. 54). Therefore, the appellant's charge of contempt is here barred.
4. Appellant has not established, and is unable to establish, that he has been hurt or damaged by the acts of appellees, complained of here. Therefore, under the law, he has no right to prosecute this appeal. There were prior to the charge of contempt, in the Court below, and still are, sufficient funds in the Registry of the Court below to pay all of appellant's claims in full, consequently he can not be damaged.
5. Appellant's brief includes many misstatements of fact and erroneous conclusions of law. The record shows that appellant's attorney wrote a letter to appellee Gallagher just after the order of November 15, 1946, was signed by Judge Schweinhaut, in which he stated that appellee Gallagher was only obligated to do the very thing which he did do and for which he is now

charged with contempt. If there is any contempt in this case, it is contempt of Court by the appellant in filing frivolous motions in the Court below in an attempt to obstruct the execution of the order of affirmance and the mandate of this Court, and for the sole purpose of delay and embarrassment, not only to appellee Drier, but to her counsel, so as to force appellee Drier to settle with appellant on appellant's terms.

ARGUMENT.

In briefing herein, for this Court, the question of contempt, the appellant Aron ignored entirely the Federal Statute which is applicable and controlling in this proceeding, Section 385, Title 28, U. S. Code. In this brief, therefore, appellees will direct their arguments to the power of the Court in contempt proceedings, set out in the Statute.

Analysis of Section 385, Title 28, U. S. Code, is as follows:

Federal Courts may summarily punish for contempt in the following 3 classes of cases:

1. Misbehavior of any person when that misbehavior is (a) in the presence of the Court, or (b) so near to the Court as to obstruct the administration of justice;
2. Misbehavior of officers of the Court in their official transactions; or
3. Disobedience or resistance by any person to any lawful writ, process, order, rule, decree or command of the Court.

These points will be discussed in the order just named and their application to the present case will be pointed out.

There Was No Misbehavior.

The first two classes of cases within the jurisdiction of the District Court to punish for contempt are based upon misbehavior. In this case, the misbehavior of appellees, charged by appellant, in the final analysis, is not that appellees disregarded the order of affirmance entered by the lower Court upon the mandate of this Court, but that after appellees were served with appellant's motion filed in the Court below, to modify the final judgment they cashed the check issued pursuant to the order of affirmance before the disposition of appellant's utterly baseless and frivolous motion to modify the judgment was disposed of, either by the Court below or upon appeal to this Court and higher Courts. We submit the act alleged, even if true, did not constitute "misbehavior" in any respect whatsoever.

Logically, appellant's contention could be extended to subsequent motions of the same general character, and it thus becomes apparent that appellant's position is that the order of the Court never is final so that it may be acted upon with impunity by the parties, and that appellant by the use of frivolous and baseless motions could forever prevent the execution of the mandate of this Court and the order of affirmance of the Court below, on the pain of being charged with a contempt of Court. If this proceeding was allowed by the Courts, we submit that the Courts might just as well abdicate since the appellees would be at the absolute mercy of the appellant.

If there is ever to be finality in the law or in the disposition of a cause in Court, it must exist after a cause has been fully and fairly argued and tried, after the injured party has appealed from the decision and after the appellant has exhausted every possible remedy of appeal, rehearing, application for writ of certiorari, as was done in the case of *Drier et al, supra*. It is final after the decision

of the Court of final resort has been handed down to the lower Court, in the form of a mandate, and order of affirmance signed and issued by the Court below. Appellant's theory in this proceeding apparently is that, notwithstanding the finality of the orders of this Court, the refusal of the Supreme Court to grant a writ of certiorari, the handing down of the mandate of this Court and the order of affirmance of the Court below, that by the means of the filing of a simple motion in the Court below to modify the final judgment of the Court below, which the Court below had no power whatever to alter, and without any application to any Court to stay the order of affirmance, without any supersedeas of any nature whatsoever, or order of any Court, staying the order of affirmance, appellant may still re-litigate and re-open the entire matter which had been disposed of by the courts of last resort. On the pain of being held for contempt of Court, the appellant contends that appellees must wait for such a frivolous motion to be decided by the Court below before cashing a check which was issued and delivered to them in accordance with the order of affirmance. If this be the law and such a contention could be sustained, then appellant can, with impunity, after the conclusion of this case—if it goes against him—file another frivolous motion in the District Court—call it what you may; and by this method obtain perpetual review of matters which are closed by the decisions of this Court and the Supreme Court.

The Alleged Misbehavior Was Not in the Presence or Proximity of the Court.

In the case of *Nye, et al v. United States, et al*, 61 S. Ct. 810, 313 U. S. 33; 85 L. ed. 1172, the Supreme Court, in construing the meaning of the applicable statute in question stated:

“In *Ex parte Robinson*, supra (19 Wall. (US) at p. 511, 22 L. ed. 208) it was said that as a result of those provisions the power to punish for contempts ‘can

only be exercised to insure order and decorum' in court.

* * * * *

The phrase 'so near thereto as to obstruct the administration of justice' likewise connotes that the misbehavior must be in the *vicinity of the court*. Nelles & King, Contempt by Publication in the United States, 28 Columbia L. Rev. 525, 530. It is not sufficient that the misbehavior charged has some *direct relation to the work* of the court. 'Near' in this context, juxtaposed to 'presence,' suggests *physical proximity not relevancy*. In fact, if the words 'so near thereto' are not read in the geographical sense, they come close, as the government admits, to being surplusage. There may, of course, be many types of 'misbehavior' which will 'obstruct the administration of justice' but which may not be 'in' or 'near' to the 'presence of the court.'

* * * * *

If that phrase be not restricted to acts in the vicinity of the court but be allowed to embrace acts which have a 'reasonable tendency' to 'obstruct the administration of justice' (Toledo Newspaper Co. v. United States, supra (247 US p. 421, 62 L. ed. 1194, 38 S. Ct. 560)) then the conditions which Congress sought to alleviate in 1831 have largely been restored.

* * * * *

It was held that the first section of the Act 'alludes to that kind of misbehavior which is calculated to disturb the order of the court, such as noise, tumultuous or disorderly behavior, either in or so near to it as to prevent its proceeding in the orderly dispatch of its business.' p. 1208. That was a plain recognition that the words 'so near thereto' connoted physical proximity." (Emphasis added)

In the case of *Ex parte Robinson*, supra, referred to with approval in the *Nye case*, the Supreme Court also stated:

"As thus seen, the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes."

Thus it will be seen that the "misbehavior" referred to in the statute must be (1) of such a character as to disturb the "order and decorum of the Court, such as noise, tumultuous or disorderly behavior"; and that it is not sufficient that the misbehavior charged has some direct relation to the work of the Court; and the word 'near', used in the statute, means "physical proximity not relevancy." Based upon this interpretation of the statute by the Supreme Court, it is plain that the misbehavior charged to appellees does not fall within the purview of the first and second classes of cases under the statute.

The order of affirmance, directing the check to be drawn to Katharine M. Drier and Bernard J. Gallagher, was dated and signed June 30, by Judge Schweinhaut. The check was issued and delivered the same date to appellees in accordance with the order of affirmance; whereas, the motion in question was not filed until July 1, and appellant admits that his motion was not served until July 1. This positively shows that the Judge authorized the removal of the funds from the Registry of the Court prior to the filing and service of the motion (App. 23, 26, 34, 36).

The check was drawn on the Treasury of the United States. It was not cashed in the vicinity of the Court House but at the Union Trust Company of the District of Columbia, approximately a mile distant therefrom, and contributed in no way to disorder, and in no way prevented the Court from "proceeding in the orderly dispatch of its business." It was clearly not of a character "calculated to disturb the order of the Court, such as noise, tumultuous or disorderly behavior." In fact, it did not even have any direct relation to the work of the Court, nor relevancy; but, even if it did, still this act would not constitute contempt in any event, since it was not done in the presence of or in the vicinity of the Court.

Furthermore, we submit that when this check came into the possession of appellees, through the order of the Court, it became their property; and, unless payment of this check

was stopped by an order of Court, and until such order was signed by the Court, appellee had a perfect right to cash the same, since the order of the Court under which it was issued remained in full force and effect at the time the check was cashed. The filing of a motion to modify the final judgment of the Court below was tantamount to the filing of a motion in that Court, to change and modify the mandate of this Court. The Court below had no power whatsoever to alter the mandate of this Court; and the mere filing of such a motion, therefore, could not only not act as a stay of the order of affirmance but was a motion over which the Court below had no jurisdiction whatsoever. It was, therefore, a purely frivolous motion and had no more binding effect upon appellees than if this same motion had been filed in Alaska. We submit, therefore, that the act complained of was not a misbehavior in any sense of the word and, clearly, not within the meaning of the statute; and, even if it was, it was not such misbehavior as is punishable under the first class of cases under the Act, because the act in question was not performed within the vicinity of the Court House.

There Was no Misbehavior of Appellees as Officers of the Court in Their Official Transactions.

The second class of cases covers misbehavior of officers of the Court in their official transactions. As stated herein under the first class of cases in question, the misbehavior complained of was not of the character to come within the purview of the Act; so that, even if the alleged misbehavior was performed by two of the appellees in their official transactions as attorneys it would be immaterial, since the alleged act was not "misbehavior" and did not occur in or in the vicinity of the Court.

Moreover, we submit that the alleged misbehavior was not within the official transactions of any of the appellees. The endorsement of a check rightfully in his possession, pursuant to and while the order of Court under which that check

was received was still in full force and effect, can not be held to be an act in the official transactions of the appellee Gallagher. It was nothing more than an act in his personal transactions, which he had a perfect right to perform. It had nothing whatever to do with his official duties either in Court or to the Court. He was not charged with the duties of a trustee or a receiver or with any duty to see to it that his client paid her debts out of the funds in question. His name was placed on the check in question as one of the payees for the sole purpose of protecting his fee. In the hearing before Judge Schweinhaut (App. 77-79)), the following colloquy occurred between Judge Schweinhaut and appellant's counsel:

"I maintain, if your Honor pleases, that we are entitled to an order modifying this judgment *nunc pro tunc*, as of July 1st, 1948, when the money was still in the hands of Mr. Gallagher and Mrs. Drier,—in order that our interests may be protected."

The Court: In what respect would you have the Court modify the judgment?

Mr. Merrick: I would have the Court modify it in such respect that it would carry out the terms of that agreement.

The Court: Then does it not come down to this:

Your present motion is really a reiteration of the position you took at the time I directed the Clerk to pay the money to Mr. Gallagher. Your position then was that I should require as I recall it, anyway,—require Mr. Gallagher to carry out for me, so to speak, the terms of the settlement agreement.

* * * * *

What you really wanted me to do then, and now, was to direct Mr. Gallagher, in the place, or instead of Mrs. Drier, to carry out the terms of her agreement.

Now, there was no motion, and it seems to me that I could only have done that by the appointment of a receiver, or the appointment of a trustee, assuming I had any power at all, to do it, which I thought I did

not,—there was no motion for a receivership. There was no motion for a trusteeship. It was simply more or less a casual conversation.

* * * * *

The Court: —and that all I could do would be to direct the Clerk, which we always do, to pay the money to counsel of record, and she then was to carry out the agreement she had made, but not under the supervision of the Court.

I didn't think I had any power, and I don't think I now have,—certainly I have less now than I had then,—to direct that this agreement be carried out under the supervision of the Court.

* * * * *

The Court: And I did not feel that I had any power to direct you to.

Mr. Gallagher: Exactly,—and I went on to say that I wanted to be included in the order for the sole purpose of protecting my fee, and Your Honor made some favorable comment about that, I will not try to put words in your mouth, but you did say something, and that was the end of it. The terms of the order were approved. Mr. Merrick sat there and collaborated in the preparation of the order just as I did, and when the order went up,—that is when we prevailed in this Court, and Betsie Ritchie and Aron took the case on appeal to the Circuit Court and Your Honor's order was affirmed there, and the Betsie Ritchie petition for rehearing,—Mr. Aron filed a memorandum in opposition to her petition for rehearing."

It is clear, therefore, that the act of appellee Gallagher, complained of, was not in his official capacity either in or with any relevancy to the Court; and, for this reason, also was not within the second class of the cases under the statute.

In the case of *Klein v. United States*, 151 Fed. (2d) 286, 80 App., D. C. 106, Henry H. Klein, an attorney at law, was adjudged guilty of contempt of Court by the lower Court, on the ground that he left the Court House

on adjournment of Court and refused to return and continue in the case being tried, on re-assembling of Court after five days' recess. The Court held that the conduct was contumacious on the part of the attorney, in refusing to return to the Court House, but held that the conduct complained of did not come within the first class of cases under the statute, since the refusal to return was not in the presence of the Court or in the geographical proximity to the Court. The Court further held that the second class of cases "is inapplicable"; and further held that the conduct complained of did not come within the third class of cases, "since it is not claimed or shown that at any time there was entered by the Court any lawful writ, process, order, rule, decree or command in relation to this subject." This Court thereupon found that since the alleged act of the attorney in refusing to return to the Court House did not come within the purview of the statute under any one of the three classifications, because the act complained of was not done either in the presence of the Court or so near thereto as to obstruct the administration of justice, although it was found that the act of the attorney complained of was contumacious and an actual obstruction to the due administration of justice. In support of its opinion, this Court cited the case of *Nye v. United States, supra*.

There Was no Disobedience by Appellees of Any Lawful Order of the Court.

Since it is not argued by appellant that appellees disobeyed any order of any Court, it is plain that the act complained of in the instant case can not fall under the third classification; and that the ruling of this Court in the case of *Klein, supra*, is controlling in the instant case, even if the acts complained of were contumacious.

We further submit that, since Congress, in the third classification, has limited the right to punish for contempt to cases of disobedience of the Court's orders, and provided for no exceptions, that this clearly indicates that Congress

did not intend that the power to hold a person for contempt would apply to a case such as the instant case, where the only ground alleged for the complaint is that the person charged with contempt acted pursuant to an order in full force and effect while a motion was pending to modify that order, and where there was no supersedeas applied for or order of the Court staying that order. Disobedience of a Court order and not mere disregard of a motion is of the *essence*, under the statute. Therefore, so long as the order of affirmance was not stayed by a supersedeas, or order of Court, it is manifest that there was no disobedience or misbehavior on the part of the appellees in acting in conformity with this order; and, consequently, no contempt either under the third or any other classification, under the act or extrinsic to the act.

In the *Merrimac River Savings Bank case*, 219 U. S. 527, 31 S. Ct., 295, 55 L. Ed. 320, relied upon by appellant, there had been an injunction entered by the lower Court, restraining the operators of a public utility from destroying certain power lines. A temporary injunction was issued. The bill was dismissed on demurrer and an appeal was taken and the injunction was continued, pending appeal. The Supreme Court dismissed the petition without opinion, and before the mandate came down the utility company destroyed the power lines, the destruction of which had been enjoined. The Court held that the appeal must be regarded as pending and undisposed of until a mandate issued, and that there was a technical contempt because the lines were destroyed before the mandate came down. The Court, however, decided that the respondents had acted in good faith, and that they considered the decree dismissing the bill as finally disposing of the action; and, therefore, discharged the Rule to show cause why the respondents should not be held in contempt. In the instant case, however, there was no injunction or stay of any kind. The mandate had come down and the lower Court had signed an order of affirmance and the check, in ac-

cordance therewith had been delivered to appellees, and it is clear from the decision of the Supreme Court in the *Merrimac* case, that if the respondents had waited until the mandate came down, thus finally disposing of the case, there could not even have been a justification for claiming a technical contempt. In the case of *United States v. Shipp*, 27 S. Ct. 165, 203 U. S. 563, 51 L. Ed. 319, also relied upon by appellant, there was a violation of an order of the Supreme Court that:

“All proceedings against the appellant be stayed and the custody of said appellant be retained, pending this appeal.”

Thus it will be seen that the cases cited by appellant come within the third classification of the statute. However, in the *Merrimac* case, even though it was pointed out that there was a technical contempt because the respondents acted after the decision had been rendered but before the mandate came down, during which time of course the injunction remained in full force and effect, respondents were discharged because it was merely a technical violation. But, as hereinbefore pointed out, not even a technical violation could be charged in the instant case. The appellees acted in good faith, in accordance with the mandate of this Court and the order of affirmance of the Court below, at the time that order was in full force and effect.

In the case of *Morgan v. United States*, 95 Fed. (2d) 830, 835, the Eighth Circuit Court of Appeals quoted with approval from the opinion of the Court of Appeals, Second Circuit, *In re Probst*, 205 F. 512, 513, where a bankrupt misappropriated funds in his hands as follows:

“Had an order been made directing him to pay the amount of the misappropriated money into the registry of the court, and he had disobeyed such order, he would be within the provisions of the section; but on the record presented here we cannot find authority for the entry of the order sought to be reviewed. This may be a highly technical ruling; but where Congress has

been so industrious to restrict the natural inherent powers of a federal court, scrupulous attention to the limitations it has imposed would seem to be the proper course."

The Motion to Modify the Order of Affirmance is Frivolous.

It is elementary that after a mandate has been handed down by this Court to the lower Court, that the lower Court is totally without power to modify or change such mandate in the slightest degree. The Court below has no jurisdiction whatsoever over such a motion. This Court, alone, had the power to change its own mandate. Yet, by this motion, filed in the Court below, appellant requested that Court to appoint trustees to receive the funds in lieu of Katharine M. Drier and Bernard J. Gallagher, the parties named in the mandate of this Court, to receive the said funds, material changes which the Court below was powerless to make.

In the case of *Durant v. Essex Company*, 101 U. S. 555, 25 L. Ed. 961, the Supreme Court stated, page 963:

"On a mandate from this Court affirming a decree, the Circuit Court can only record and order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established. * * * After the appeal was taken the power of the Court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down. We affirmed this decree and ordered execution. We might have ordered a modification so as to declare that the dismissal should be without prejudice. We didn't do so. The Circuit Court had no power after that to do what we might have done and did not do."

In the case of *Clarke v. Hot Springs Electric Light and Power Company*, 76 F. (2d), 918, the Tenth Circuit Court of Appeals stated, page 920:

"The trial court was without authority to modify the decree, after affirmance, by adding to it a provision

as to interest or by changing the allowance of counsel fees from 'the attorneys for the said plaintiffs' to 'the plaintiffs'. If the decree of July 16, 1930, was in error in such respects, the points should have been raised on the first appeal. * * * Certainly a trial court should not be reversed for declining to amend a decree which this court has affirmed."

In the case of *Kimberley v. Arms, et Ux*, 40 F. 548, 551-552, Appeal Dismissed 10 S. Ct. 1064, 136 U. S. 629, 34 L. Ed. 557, where a bill of review was filed to review a decision of the Lower Court, from which an appeal had been taken, at page 551, the District Court referred to many Supreme Court cases, citing *Humphrey v. Baker*, 103 U. S. 737, and said:

"Even the objection of a want of jurisdiction on the part of this Court can not be entertained in respect to a cause remanded to it by the Supreme Court for further proceedings. * * * So, in *Ex parte Story*, 12 Pet. 339, the action of the Court below in refusing to allow the defendant to file a supplemental plea and answer setting up new matter, was sustained because the case was before it upon a mandate from the Supreme Court, and the Court below was bound to execute the mandate. To the same effect is the case of *Ex parte Sibbald* Id. 488, * * * They can not vary it, or examine it for any other purpose than execution or give any other or further relief." See also, *Ex parte Railroad Company*, 68 U. S. 69, 1 Wall. 69, 17 L. Ed. 514.

In the case of *Gaines v. Caldwell*, 13 S. Ct. 611, 148 U. S. 228, 37 L. Ed. 432, the Circuit Court at page 437, referred to the case of *Washington and Georgetown R. Company v. McDade*, 10 S. Ct. 1044, 135 U. S. 554, 34 L. Ed. 235, wherein the Supreme Court had affirmed the judgment of the Supreme Court of the District of Columbia for recovery of damages in an action of tort and pointed out that the Supreme Court in its judgment merely affirmed with costs the judgment of the lower Court but said nothing about interest. The Court below on presentation to it of

the mandate entered up a judgment against the defendant for interest on the judgment from the date of that judgment as originally entered. The defendant took exception to such action and applied to the Supreme Court for writ of mandamus to compel the Court below to vacate its judgment entered on the mandate, so far as it related to interest. The Supreme Court held that the mandamus must be granted irrespective of the question of whether a judgment founded on tort bore or ought to bear interest in the Supreme Court of the District of Columbia and issued a mandamus commanding the Court below to vacate this judgment, so far as it related to interest, since the mandate did not include a provision for interest.

Applying the above decisions to the instant case, it is plain that the motion to modify the judgment was absolutely void on its face. The Court was without jurisdiction and had no power whatsoever to grant such a motion. The Court had not even given the appellant the right to file such a motion. Such a motion could, therefore, have no effect whatever upon appellees; and any claim of contempt based upon a disregard by appellees of such a motion is absurd. Appellant has not cited a single case which in the slightest degree supports his contention.

The conclusive character of the authorities on this point must account for the fact that appellant did not appeal from the denial of his motion to modify the final judgment, but rather seeks, by the indirect method of appealing a denial of a motion for contempt, to achieve the same purpose.

Appellant's Charge of Contempt Is Barred by His Failure to Appeal from the Decision of Judge Schweinhaut.

In the instant case, as hereinbefore pointed out, the appellant charged appellees with contempt, not only before one Judge, but on another occasion before another Judge of the Court below; and in both instances, after full argument of counsel on both sides, both of these Judges refused

to hold respondents for contempt. It is true that the first charge of contempt was made orally in the argument before Judge Schweinhaut on the motion to modify the judgment but, in support of this motion, appellant made the same charges of contempt as he later made before Judge Ben Moore. When Judge Schweinhaut indicated that he would not grant appellant's motion, he was then asked by appellant's counsel whether he condoned the acts of appellees, to which Judge Schweinhaut replied, "Motion overruled." No appeal whatever was taken from this refusal of Judge Schweinhaut to hold appellees in contempt. But since this charge of contempt was made in open Court before Judge Schweinhaut and he refused to give consideration to the same, we submit this refusal of Judge Schweinhaut to hold appellees for contempt, barred appellants from any further proceeding on the same charge of contempt, in the absence of appeal within the proper time from the order of Judge Schweinhaut, overruling the motion to modify the final judgment; and certainly the failure to appeal from this order within the proper time settles for all time the fact that this motion was totally without merit.

Appellant Has No Right to Prosecute This Appeal, Since He Has Not Established That he Has Been Hurt or Damaged by the Acts of Appellees.

A contempt is considered civil when the punishment is wholly remedial and serves only the purpose of the complainant and is not intended as a deterrent to offenses against the public. *Nye v. United States, supra*.

The present proceeding by appellant is wholly remedial since it serves only the purpose of appellant and, therefore, unless appellant is injured by the acts complained of, he has no right to prosecute this appeal and his complaint must fail.

Dangel on Contempt, 1939 Edition, Section 3, page 3, states in respect to civil contempt:

“The misconduct cognizable is such as arises out of *injury* or wrong done to a party who is a suitor before the Court and has *established a claim entitled to the Court's protection.*” (Italics ours)

In this case appellant Aron has established no claim entitled to the Court's protection. This Court said in its decision in *Ritchie v. Drier*, supra, that Aron had no interest in the fund of \$54,497.32, paid into the Registry of the Court below, except to the extent that such an interest if any was given him by the agreement of May 2, 1945, between Aron and Drier. The meaning of this agreement has now been put in controversy in the Court below by appellant Aron's counter-claim and appellee Drier's answer thereto.

Parenthetically, it should be noted here that subsequent to the date of Judge Schweinhaut's original order below, November 15, 1946, the defendant, the Secretary of the Treasury, has paid into this Registry of the Court below the additional sum of \$39,402.53, which was monies due appellee Drier under awards of the Mixed Claims Commission and Private Law 509. (App. 30, 31)

Aron has not yet established by any proceeding in this Court or any other Court that he is entitled to any part of this money, although there is pending at the time of the filing of this brief separate motions for summary judgment filed by appellant Aron and appellee Drier by which each attempts to establish a claim to all or part of the additional funds referred to.

On this state of the record appellant Aron has not established any claim to the funds in the Registry of the Court, which would entitle him to the Court's protection. His claim at present is unliquidated. Furthermore, should appellant Aron establish the claims that he has made, there are sufficient funds in the Registry of the Court below to satisfy these claims (App. 30, 31). It can not, therefore, be said that he was injured or damaged in the slightest degree by the acts of the appellees of which he complains.

Comments on Appellant's Brief.

There are numerous untrue statements made by appellant, which appellees believe should not be allowed to go unchallenged.

Appellant states on page 5 of his brief, starting with the last sentence on that page, as follows:

"The final judgment of the Court below, dated November 15, 1946, provided that 'The settlement agreement of May 2, 1945, between plaintiff' (Mrs. Drier) 'and Harold G. Aron is approved,' " (Appendix 3, Rec. 17, 18); but instead of directing payment of the funds to Mr. Gallagher and Mr. Galloway, as had been requested by Mrs. Drier and her counsel, Mr. Gallagher, the judgment *which was prepared by Mr. Gallagher* (Emphasis supplied), directs that the Clerk 'pay plaintiff Drier and to Bernard J. Gallagher, her attorney, jointly, the sum of \$36,331.55 * * *."

It is characteristic of appellant's evasion of the facts that he states to this Court, that appellee Gallagher was author of the order on which judgment was entered. This statement is untrue as is shown by the transcript of the argument before Judge Schweinhaut on October 15, 1948, on Aron's motion to modify the final judgment. At pages 5 and 6 thereof (App. 77), Mr. Merrick stated to Judge Schweinhaut:

"Your Honor probably will recall the meeting we had in your Honor's chambers, about the phraseology of that judgment. I was present. Mr. Gallagher was present. Counsel for Mrs. Ritchie, I think, was present, one Henry J. Quinn,—and, I can't recall whether any other counsel were there or not.

"Discussion arose as to how the phraseology of that final order should be made, and at my suggestion, Mr. Galloway's name was left out because he was no longer counsel."

It will be seen from the quotation out of Mr. Merrick's own mouth that he was present and participated in the framing of the judgment.

Another instance of his perversion of the truth is as follows: On page 5 of appellant's brief, this statement is made:

"It was specifically understood and agreed that when payment was made by the Clerk of the Court of the funds in the Registry of the Court, such payment would be by check to the order of Herman J. Galloway, the counsel for this appellant, and Bernard J. Gallagher, counsel for appellee Drier, who were to disburse the funds in accordance with the terms of the agreement. * * *."

How can this statement by appellant be reconciled with his statement before Judge Schweinhaut on October 15, 1948, hereinbefore quoted, but here repeated:

"* * * at my suggestion Mr. Galloway's name was left out because he was no longer counsel."

The transcript of the argument before Judge Schweinhaut on October 15, 1948 (App. 78) further shows that, at the time the order of November 15, 1946, was prepared and signed by the Court, appellant, through his counsel, Merrick, endeavored to have that order so drawn that it would charge appellee Gallagher with responsibility of seeing to it that appellee Drier carried out the terms of her settlement agreement with appellant Aron, dated May 2, 1945. The transcript (App. 79) shows that appellee Gallagher declined to accept that responsibility and that Judge Schweinhaut was of the opinion he had no power to charge appellee Gallagher with that responsibility; that the only reason appellee Gallagher was included in the order of the Court below was to protect his fee; that the Court below considered it was the responsibility of appellee Drier to perform her contract with Aron.

The argument on the motion to declare appellee in contempt, before Judge Ben Moore, shows that immediately following the conference in Judge Schweinhaut's Chambers on November 15, 1946, appellee Gallagher wrote to Rich-

ard L. Merrick, appellant Aron's counsel, and on November 21, 1946, received a reply from him (App. 82, 83).

This exchange of correspondence shows that no later than November 15, 1946, the date of the conference in Judge Schweinhaut's Chambers, appellant Aron had knowledge through his attorney, Richard L. Merrick, that appellee Gallagher proposed to deliver to appellee Diermonies that came into his hands, after deducting his fee, and that he disclaimed any responsibility of seeing to it that appellee Dier carried out the terms of the agreement of May 2, 1945. The correspondence further shows that Aron's counsel, Merrick categorically agreed with the position of appellee Gallagher, saying:

"However, the wording of your proposed order, namely, 'In conformity with this agreement of May 2, 1945', etc., created in my mind a situation in which you might meet with just what I pointed out in Court; namely, a claim that you had assumed responsibility for seeing to the application of the 'war chest' 'in conformity with this agreement.' 'However the new draft of order, a copy of which I have received from Mr. Justice Schweinhaut, eliminates the provision referred to above, and, *I think, imposes no burden or obligation upon you other than to pay the money over to your client.*" (Italics ours.)

The above statement was written by Merrick after starting his letter with the statement:

"I have your letter of the 18th in the Dier matter, and have noted the contents carefully." (Italics ours.)

Notwithstanding this clear knowledge of the intention of appellee Gallagher, and his obligations which were clearly understood by Appellant and approved by the Court below, and was patent upon the face of the order of the Court below, appellant Aron says in his summary of argument (p. 10 of his brief) that appellees are in contempt of Court because:

“The actions of counsel for appellee Drier in making statements to lull into inaction appellant and his attorney demonstrate that their conduct was willful and contumacious.”

It is undisputed by Aron's counsel, Merrick, that he sat in on the conference in Judge Schweinhaut's Chambers Nov. 15, 1946, when the order now complained about was prepared. Furthermore, his exchange of correspondence with appellee Gallagher makes a written record of his knowledge. It is presumed that Merrick duly reported to appellant Aron upon the conference in Judge Schweinhaut's Chambers and upon his exchange of correspondence with appellee Gallagher. Both Mr. Aron and Mr. Merrick are lawyers of long experience. Both knew that if they disagreed with the order of the Court below, of November 15, 1946, they should have appealed therefrom, Aron having a status in the case of an interpleaded party. But no appeal was taken by Aron from the order now complained of. Instead, he sought to have the order affirmed, even going so far as to write an independent brief in the Supreme Court in opposition to the petition for certiorari of Betsy Ritchie, appellant Aron's first wife, who sought to have the order reviewed after it had been affirmed by this Court in *Ritchie v. Drier*, supra.

Knowing from the date of the order of November 15, 1946, of the intention and obligations of appellee Gallagher with respect to the disbursement of the funds in question, we submit that if Aron was not satisfied with the order of November 15, 1946, and of the intentions of attorney Gallagher with respect to disbursements thereunder, he was obligated to take steps: (1) to appeal the order of November 15, 1946; or (2) to stay the mandate of this Court, affirming the order; or (3) take steps appropriate to stay the order of affirmance of the Court below, upon posting suitable supersedeas bond. No such action whatever was ever taken by appellant; but, on the contrary,

after the signing of the order of affirmance and execution thereunder by the issuance of the check he filed a frivolous motion in the Court below to modify and materially change the order of the Court below, which had been affirmed by this Court, a motion over which the Court below had no jurisdiction whatsoever or power to grant.

A further example of the untrue statements made by attorney Merrick on this same subject will be found in the following colloquy between Judge Ben Moore and Merrick, on the hearing on appellant's motion now before this Court (App. 24), as follows:

"The Court: * * *

"I understand that there is no allegation that Mr. Gallagher or his client actually disobeyed any order that was entered by the Court. The allegation, as I understand it is that Mr. Gallagher had agreed, either expressly or tacitly to enter an order which would have required these moneys to be paid out jointly to himself and to the attorney for Mr. Aron, that he procured the entry of an order permitting the money to be paid out only to himself and his own associates and that between that time and the time the money actually came into his possession, you had served him with a motion to modify the order; that after he was served with that motion, he got the money out of the Registry and removed it from this jurisdiction. Then your motion, then pending, was later denied?

"Mr. Merrick: That is right."

This statement, repeated before Judge Ben Moore and now repeated again in appellant's brief, that Mr. Gallagher prepared and procured the entry of an order permitting the money to be paid to himself and his own associates instead of to Mr. Gallagher and Mr. Galloway, the former attorney for appellant, as previously agreed we have heretofore shown was a false statement.

The further statement made by counsel for appellant before Judge Ben Moore, viz.: After appellees were served with appellant's motion, appellee Gallagher got the money

out of the Registry of the Court and removed it from the jurisdiction is, also, untrue. The removal of the funds from the Registry of the Court was done pursuant to the order of affirmance prior to July 1, the date that appellant claims he filed and served his motion. This is shown by the fact that the order of affirmance is dated June 30, 1948, and the check issued pursuant thereto was signed by Judge Schweinhaut on the same date and issued to appellees.

Likewise, the statement in appellant's brief (pages 8 and 10) that Mr. Gallagher stated to Aron's attorney that no additional Court order had been obtained and that none was necessary while an *ex parte* order, namely the order of affirmance June 30, 1948, was prepared by Messrs. Gallagher and Hendry is contrary to the fact; and the allegation that such statements lulled appellant's counsel into inaction is so ridiculous and absurd as to need no comment. Both appellant and appellant's counsel are attorneys of long experience; and if they knew anything about the procedure before this Court, they certainly must have known that an order of affirmance was the usual and proper practice where this Court had sent down its mandate to the lower Court, and it would be next to ridiculous for Mr. Gallagher, with his long experience in practicing before this Court, to make any such statement as alleged to other counsel.

Another perversion of the truth and misleading statements of the appellant will be found on page 20 of his brief wherein he states that the appellant in the Court below, on the argument on appellant's motion to have appellees declared in contempt before Judge Ben Moore brought to the attention of Judge Moore:

“* * * in the very hope that this would afford a way out for the appellees and her attorneys * * *”

the fact that there was on deposit in the Registry of the Court at that time an amount of money sufficient to dis-

charge appellant's claim if he prevailed upon those claims. This statement is sheer hypocrisy on the part of appellant, and the argument is illogical.

He knew before he filed his motion to modify the final judgment in this case, that additional funds had been deposited in the Registry of the Court below, yet at the argument on that motion before Judge Schweinhaut he made the same sort of accusations against appellees as he makes here and argued that appellees were in contempt of Court. If he really felt as kindly toward appellees as he would have this Court believe, then he never would have filed this motion to have appellees declared in contempt—and certainly would not have taken this appeal to this Court. The presence of the additional funds in the Registry of the Court below in sufficient amount to pay the full amount of appellant's claims, which claims are still disputed by appellees and are now subject to motions for summary judgment in the Court below have not prevented appellant from pursuing his policy of harassment and intimidation.

Appellant seeks to have this Court believe that he suggested to Judge Moore that, in view of the fact that there was sufficient money in the Registry of the Court at that time to satisfy his claims, that he had, so to speak, achieved satisfaction on the field of honor and, therefore, the overruling of his motion to adjudge in contempt, etc., was proper.

Appellant thereafter states in his brief, pages 20, 21, that, subsequent to the overruling of the motion, appellee Drier, as principal, and appellees Gallagher and Hendry, as attorneys, by filing an answer to appellant's paper designated counter-claim in this case, to his surprise, demonstrated that they were not completely quelled by the proceedings to which they had been subjected by Judge Moore at appellant's instigation. Appellant thus is in this position: He pointed the road, as he avers, to the Court-below's denial of his motion to have appellees declared in contempt

of Court; but the crime of appellees was subsequent to the entry of the order overruling appellant's motion for contempt. Appellees asserted what they deemed to be their rights, by filing an answer to appellant's counter-claim. In essence, appellant states here that appellee's crime is the assertion of rights before the Court below.

As a matter of fact, Judge Ben Moore in the hearing before him solicited from Mr. Gallagher the information which appellant's counsel claims he suggested to him in the hopes of helping appellee's attorneys out of their predicament. This is shown by the following colloquy between Judge Ben Moore and Mr. Gallagher: (App. 30, 31)

"The Court: * * *

Is there enough money in the Registry of the Court now in this same proceedings to take care of that if it should be adjudicated that he is entitled to it?

"Mr. Gallagher: Yes.

* * * * *

"The Court: And he can get it out of the fund that is in the Registry of the Court now?

"Mr. Gallagher: That is right. There is more than enough there now to pay the total claims in this counter-claim, if they are entitled to it."

At page 7 and other places in appellant's brief, appellant reiterates the statement that when served with appellant's motion, appellees Gallagher and Hendry made untrue statements that the funds in question had already been received and paid out, although these funds were not paid out until after the motion was served; that there has been no denial by appellees Gallagher and Hendry, of this statement. In reply to this allegation, appellees wish to state that they did not either affirm or deny the same because the allegations were entirely immaterial to the issues. We do wish, however, now to go on record before this Court, in stating that even if the motion had been served on appellees, as claimed, before the funds were paid out, appellees would have acted exactly as they did act and would not have waited for that frivolous and void motion to be acted

upon by the Court below, knowing that that Court had no jurisdiction and no power to grant such a motion; that there was no order of the Court staying the cashing of the check; believing that they were acting in entire good faith, in accordance with the mandate of this Court and the order of affirmance of the Court below, and knowing that they were acting exactly as appellant's attorney, Merrick, had previously advised appellee Gallagher was the only obligation which appellee Gallagher had under the order of November 16, 1948.

The record in the case of *Ritchie v. Drier, supra*, shows that for a period of about three years, the funds in controversy were on deposit in the Treasury of the United States and would have been paid to appellee Drier but for invalid claims which this Court later held were without merit; that these claims were made against these funds by appellant and his many creditors, including his divorced wife and the Collector of Internal Revenue; and that, after these funds were finally paid into the Registry of the Court below, pursuant to a mandamus suit brought by appellee Drier, appellant and appellant's divorced wife, Betsy Ritchie, further tied up these funds for a period of five years, until on June 21, 1948, the Supreme Court of the United States refused her a writ of certiorari. The mandate of this Court was then sent down to the Court below, holding that appellant Aron had no interest in the funds in the Registry of the Court except whatever interest, if any, he might have by reason of the agreement of May 2, 1945. On June 30, 1948, an order of affirmance was duly signed by the Court below and check issued on that date and delivered to appellees, pursuant thereto, payable to Katherine M. Drier and Bernard J. Gallagher. Thus it will be seen that appellant Aron and his creditors had unjustly tied up the funds of appellee Drier by a series of invalid claims for a period of eight years, and when appellees finally obtained possession of the check, pursuant to the orders of the highest Court, appellant by a frivolous motion sought to have

the entire litigation started all over again, a course which he clearly had no right to take. He now has the temerity to claim, after unjustly tying up appellee Drier's funds for so many years, that appellees are guilty of contempt of Court, after a final adjudication of her rights by the highest Court because appellee Drier did not continue to deprive herself of her own money and hold her check uncashed until such time as appellant Aron could further litigate the entire matter all over again, thus subjecting appellee Drier to further years of delays before she could receive the benefits of her own funds.

Appellant Aron well knew that appellee Drier was in financial distress due to these many years of delay. (App. 13, 41) It was then and still is very apparent that appellant hoped and still hopes, by such procedures and by the filing of such frivolous motions, including motions for contempt of Court, to indefinitely tie up and prevent appellee Drier from obtaining money justly and properly due her as decreed by the highest Court.

The strange and unbelievable part of the claim of appellant that appellees are in contempt of Court is that appellant's own counsel is now claiming that appellees are in contempt of Court because they did the very thing which he himself, in his own letter, advised appellee Gallagher was the only thing that appellee Gallagher could properly do. We repeat again this statement of Merrick:

"However, the wording of your proposed order, namely, 'In conformity with this agreement on May 2, 1945', etc., created in my mind a situation in which you might meet with just what I pointed out in court; namely, a claim that you had assumed responsibility for seeing to the application of the 'war chest' 'in conformity with this agreement.' However, the new draft of order a copy of which I have received from Mr. Justice Schweinhaut eliminates the provision referred to above, and, I think imposes no burden or obligation upon you other than to pay the money over to your client" (Ap. 83).

Appellee Gallagher further maintains that he had a duty to his own client and not only did justice demand but legally he was required to do and had a perfect right to do what he did do—pay out these funds to his client, irrespective of whether or not appellant's frivolous motion was served on him prior or subsequent to the cashing of the check.

No order to stay the cashing of the check was ever even applied for. Not only appellant, who was an attorney, but appellant's attorney, knew perfectly well that that was the proper procedure to prevent the cashing of the check and they had known for almost two years what the obligations and intentions were of appellee Gallagher. The only reason that they did not apply for such a stay is that they, also, knew perfectly well that the Court would not grant them any such stay; and they, also, knew perfectly well that the Court had no jurisdiction or power to grant the frivolous motion which they filed, so that it is perfectly apparent that these litigants, lawyers of many years' standing, were endeavoring and are now endeavoring by these motions, to tie up appellee Drier's funds for such an interminable period of time, so that finally from sheer exhaustion and financial stress she will be forced to pay appellant whatever he demands, irrespective of whether or not he is entitled to the same. The purpose of the present litigation before this Court is plainly not only to intimidate appellee Drier but also her counsel in an endeavor by such procedure and long delays incident thereto appellant might thereby force appellee Drier to her knees. It is plain, beyond any argument, that this litigation before this Court *can be for no other purpose, since appellant admits there are sufficient funds in the Registry of the Court below to satisfy in full the claims of appellant, even if he had any valid claim.*

If there is any contempt of Court in this case, it is the contempt of appellant and his counsel in filing a motion in the Court below to interfere with the carrying out of

the order of affirmance of the Court below and the mandate of this Court, knowing as lawyers of long experience, that the Court below had no jurisdiction or power to grant such a motion; and, also, in filing motions in the Court below, charging not only appellees Drier but, also, her counsel, with contempt of Court, for the purpose of intimidation and delay. Such actions under such circumstances are contumacious. They come within the purview of the statute, since they were performed in the presence of the Court in their official capacity as attorneys in an endeavor to obstruct the due process of justice, and were aimed at obstruction to the execution of the order of affirmance and the mandate of this Court.

CONCLUSION.

Appellees respectfully submit that the order of the Court below should be affirmed, with costs to the appellant.

BERNARD J. GALLAGHER,
*Attorney for Katharine M. Drier
and in his Own Behalf.*

M. WALTON HENDRY,
*Attorney for Katharine M. Drier
and in his Own Behalf.*

J. ROY THOMPSON, JR.,
*Attorney for Appellees,
Union Trust Building,
Washington, D. C.*

No. 10,288

REPLY BRIEF OF APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD G. ARON, *Appellant*,

v.

KATHARINE M. DRIER, BERNARD J. GALLAGHER, and
M. WALTON HENDRY, *Appellees*.

Appeal from an Order of the United States District Court
for the District of Columbia Denying a Motion for an
Order Adjudging Appellees in Contempt of Court and
Requiring Them to Restore Funds to the Registry
of the Court.

United States Court of Appeals _____

For the

District of Columbia Circuit

FILED FEB 3 1950

Joseph W. Stewart
CLERK

HAROLD G. ARON,
726 Jackson Place,
Washington, D. C.,
and

RICHARD L. MERRICK,
1025 Vermont Ave., N. W.,
Washington 5, D. C.,
Attorneys for Appellant.

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of the Court.

REPLY BRIEF OF APPELLANT

Because of many charges of falsehood on the part of
appellant and his counsel in the brief of appellees and of
inaccurate statements therein, this reply brief is submitted.

BASIS OF CHARGE OF CONTEMPT

In the opening paragraph of appellees' brief, Page 1,
the statement is made that appellees are "accused of con-
tempt of Court because they obeyed and carried out the

final order of affirmance of the Court below upon the mandate of this Court, while the order of affirmance was still in effect."

That is not a correct statement. The motion to adjudge appellees in contempt (App. p. 55) requests an order of Court

"1. Adjudging the plaintiff, Katharine M. Drier, in contempt of this Court for removing from the jurisdiction of this court the subject matter of a pending proceeding herein before the termination thereof.

"2. Adjudging Bernard J. Gallagher and M. Walton Hendry, attorneys for plaintiff herein, in contempt of this Court for aiding and assisting the plaintiff in the removal from the jurisdiction of this Court of the subject matter of a pending proceeding herein before the termination thereof."

The motion also sought an order directing the restoration of the funds to the registry of the court.

WITHDRAWAL OF FUNDS FROM REGISTRY OF COURT

With reference to the withdrawal of funds from the registry of the court below without notice to appellant after notice from appellant not to do so, dated June 26, 1948 (App. p. 50), appellees state on Page 3 of their brief:

"This check was delivered on June 30, 1948, to appellees, was cashed by them and, except for counsel fees, the proceeds were turned over to Katharine M. Drier."

That statement is not in accordance with facts. The record discloses that the check in question was deposited in the Union Trust Company on July 1, 1948, to the credit of Bernard J. Gallagher, Special, was collected over the counter by bank messenger on July 2, 1948, and was withdrawn on July 6, 1948, by a check issued by Mr. Gallagher (App. p. 45, 53, 54) .

The impression created by the quoted statement from appellees' brief that the check was received, cashed, and the proceeds, less attorney fees, paid over to Mrs. Drier all on June 30, 1948, is not borne out by the record. The statement creates a wholly erroneous impression. In fact, Mr. Gallagher's own statement that the proceeds of the check were withdrawn from the bank "on a counter check" (App. p. 27) shows conclusively that the check was not cashed and the proceeds turned over to Mrs. Drier as now claimed by appellees in their brief. Mr. Gallagher has not produced or offered to produce the counter check used to withdraw the funds, in order that its date may be shown. He is in possession of the evidence which would clear up that point, yet he refuses to produce it. His best defense against the charge made against him is to produce the check, if it corroborates oral statements he has made as to date of withdrawal of the funds but which he has refused to make under oath.

Power of Court to Punish for Contempt

Appellees quote the Federal statute relating to contempt of court and maintain that the lower court's jurisdiction is circumscribed and limited by the statute. They fail to consider those decisions which declare that the power of a court of record to punish for contempt is inherent in the court and broader than the statute. If that were not so, litigants and attorneys, with impunity, could remove the subject-matter of a pending proceeding, whether meritorious or not, from the jurisdiction of the court and thus render the court powerless to enforce and carry out its judgments. The power of the court extends to cases in which the misbehavior tends to obstruct the administration of justice. That being so, there seems no question that the court may punish the misbehavior as a contempt, although the statute does not cover it. The contentions of appellees are in effect that they can anticipate the decision of the court on a matter they believe is without merit. The test

is not whether the pending proceeding has merit, but whether it is pending and not disposed of by the court.

Appellees argue that they cannot be held in contempt because there was no injunction or supersedeas issued or sought in connection with the motion to modify the judgment of the court below. They themselves are responsible for that situation. Mr. Gallagher informed appellant that "his client was 'on his neck' and that he could not do other than collect and disburse the money to her without regard to my rights, unless I served him with some kind of court papers". He also informed appellant's attorney that "there had been no additional court order entered and none was necessary" (Affidavit of Aron of Aug. 27, 1948, App. p. 43, 44). As a result of those representations, appellant believed that Mr. Gallagher would withhold that portion of the funds in his hands payable to appellant under the settlement agreement of May 2, 1945, upon being served with the motion referred to above. Because of such statements, Appellant did not believe that an injunction or supersedeas bond or other restraining order was necessary, as he then had faith in Mr. Gallagher's integrity as an attorney who, having participated in the making of an agreement on which his client had been enabled to obtain the release of funds from the registry of the court, would, to the extent of his ability, see that his client carried out and performed her obligations to another attorney who had represented her so successfully and whose efforts were responsible for her being entitled to receive the money (See Aron's Aff. of Aug. 27, 1948, App. pp. 38-50). However, Mr. Gallagher so lightly regarded the obligations imposed upon his client by the agreement he helped to formulate that, after a warning not to do so, he paid over to his client the funds claimed by appellant and she immediately left the jurisdiction of the lower court with them.

"GOOD FAITH" OF APPELLEES

At page 18 of their brief, appellees state that they "acted in good faith". If that were so, why was it necessary for Mr. Gallagher to represent to appellant that his client was "on his neck" and unless served with "some kind of court papers" he would have to pay over the funds to Mrs. Drier, and to state to appellant's counsel that "there had been no additional court order entered and none was necessary". (App. p. 44)

INJURY TO APPELLANT

Appellees argue that because appellant has not shown that he has been injured, he has no right to prosecute this appeal (Brief, pp. 22, 23).

That appellant has been injured by the conduct of appellees in ignoring a pending motion is self-evident. Their conduct in removing and assisting in the removal of the subject-matter of the motion before it was heard deprived him of the receipt of moneys due him under the terms of the agreement of May 2, 1945. That was damaging, to put it mildly.

COMMENTS BY APPELLEES ON APPELLANT'S BRIEF

At Page 24 of their brief, appellees quote from page 5 of appellant's brief, and stress a statement that the judgment of the court below was prepared by Mr. Gallagher.

It is true, of course, that all parties to the proceeding participated in the discussion as to the phraseology of the judgment, but counsel has always believed that Mr. Gallagher prepared the judgment, as is usual. Appellees have included in their part of the appendix only excerpts from the record relating to the discussion concerning the framing of the judgment.

Mr. Galloway's name was omitted, because he was no longer counsel for appellant, but the excerpt printed at page 77 of the appendix and referred to by appellees is not all of the discussion that occurred.

Agreement to Pay Funds to Trustees

At page 25 of their brief, appellees characterize a statement quoted from page 5 of appellant's brief to the effect that there was an agreement to pay the funds to trustees as a "perversion of the truth." The statement in question is substantially the same as made under oath by appellant in his affidavit of August 27, 1949 (App. p. 48), and, until their brief was prepared, has never been denied by appellees, under oath or otherwise. If it was untrue, it should have been denied by a counter affidavit by appellees promptly after a copy of appellant's affidavit was served upon Mr. Gallagher. The quoted language refers to the time when the settlement agreement of May 2, 1945, was entered into, and its truth is borne out by Mr. Gallagher's statements made in his motion to approve the settlement agreement, filed in the court below on September 12, 1945, as follows:

"Now comes the plaintiff, Katharine M. Drier, through her attorney and moves that the Court approve the settlement of the above-entitled action between the plaintiff, Katharine M. Drier and Harold G. Aron and direct the Clerk of the Court to pay the fund of \$54,497.32 now deposited in the Registry of this Court to Bernard J. Gallagher and Herman J. Galloway as attorneys, respectively, for Katharine M. Drier and Harold G. Aron for disbursement by them in accordance with the agreement of settlement made between Katharine M. Drier and Harold G. Aron." (App. p. 21)

Mr. Gallagher made the same statement in his points and authorities filed in the court below in support of his motion to approve the settlement agreement of May 2, 1945 (App. pp. 21, 22)

If it was not "specifically understood and agreed that when payment was made by the clerk of the Court of the funds in the Registry of the Court, such payment would be by check to the order of Herman J. Galloway, then counsel for this appellant, and Bernard J. Gallagher, counsel for appellee Drier, who were to disburse the funds in accordance with the terms of the agreement," how do appellees account for the motion and supporting memorandum for approval of the settlement agreement requesting that the funds be so paid to Messrs. Gallagher and Galloway?

If there is any "perversion of the truth", it is not on the part of appellant and his attorney.

Letter of November 21, 1946

At pages 25 and 26 of their brief, appellees refer to and quote from a letter of November 21, 1946, from appellant's counsel to Mr. Gallagher. As is readily apparent, that letter was written before appellant had sent to Mr. Gallagher his telegram of June 26, 1948 (App. p. 50), and before counsel for appellant had any idea that if the funds were paid over to Mrs. Drier, Mr. Gallagher would not see that she carried out the terms of the agreement he helped her to make with appellant. After quoting a part of the letter mentioned above, appellees, at page 27 of their brief, state:

"Knowing from the date of the order of November 15, 1946, of the intention and obligation of appellee Gallagher with respect to the disbursement of the funds in question, we submit that if Aron was not satisfied with the order of November 15, 1946, and the intentions of attorney Gallagher with respect to disbursements thereunder, he was obligated to take steps: (1) to appeal the order of November 15, 1946; or (2) to stay the mandate of this Court, affirming the order; or, (3) take steps appropriate to stay the order of affirmance of the court below, upon posting supersedeas bond."

The remainder of the letter of November 21, 1946, from counsel for appellant to Mr. Gallagher is as follows:

“When the funds are turned over to you and Mrs. Drier, it seems to me she will be entitled to use right away, if she so desires, \$300.00 per month beginning May 2, 1945, a period of eighteen months to the present month, or some \$5,400.00. If that is true, Aron would seem to be entitled to receive the same lump sum amount. As you know, Mr. Galloway and I are entitled to a fee. I am wondering, therefore, if you would be willing to get Mrs. Drier’s permission to pay over to Aron and to me jointly the sum mentioned. In that way, my fee and that of Mr. Galloway would be protected, or, if you desire, the check could be made payable to all three.”

Mr. Gallagher never wrote or told counsel for appellant that he would not carry out that request. At that time, no appeal had been taken from the judgment of November 15, 1946, and appellant and his counsel had reason to believe that the funds would be paid over soon, and that due notice thereof would be received by them before the funds were withdrawn from the registry of the court below. Since no reply was made by Mr. Gallagher to the letter of November 21, 1946, counsel for appellant assumed, as he thinks he had a right to do, that Mr. Gallagher would respect the request of a fellow attorney concerning his fee and would not, without notice, present an order to the Court below for withdrawal of the funds, and, after notice from appellant (telegram of June 26, 1948, App. p. 50) state that no additional court order had been entered and none was necessary (App. p. 44), when, as a matter of fact, the “Order of Affirmance” (App. pp. 34-36) was entered on June 30, 1948, without notice to appellant, his counsel, or any of the other attorneys of record in the case (App. p. 44). All of the circumstances indicate a deliberate scheme on the part of appellees to get the money out of the registry of the court without notice to appellant or his attorney so that appellee Drier might, as she actually did, remove the

funds out of the jurisdiction of the court without regard to appellant's rights or the obligations of her agreement.

Lulling Appellant Into Inaction

The quotation from appellant's brief appearing at the top of page 27 of appellees' brief concerning conduct lulling appellant into inaction refers to the conduct of Mr. Gallagher, already referred to, about the time of the withdrawal of the funds and not to the period of time between November 15, 1946, and just prior to the withdrawal of the funds from the registry of the Court. If Mr. Gallagher had replied immediately to appellant's telegram of June 26, 1948 (App. p. 50) and informed appellant that he had no intention of assisting another lawyer or of trying to have his client carry out the terms of her agreement which he assisted in negotiating (as he now admits was his intention), appellant would have had an opportunity to take additional steps to attempt, at least, to prevent appellees from removing beyond the reach of the processes of the court below the funds from which appellant might be paid.

Statements to the Court

Again at page 28 of appellees' brief, reference is made to the statements of counsel relative to the agreement that the funds, when withdrawn from the registry of the Court, would be paid over to Mr. Galloway and Mr. Gallagher. We can only repeat, in reference thereto, that Mr. Gallagher's own representations to the court below in his motion to approve the settlement agreement of May 2, 1945, and supporting memorandum, establish the fact that such an agreement was made.

Furthermore, Mr. Galloway had not withdrawn as trustee, but only as counsel in the case and the status remained the same, as indicated by Aron's telegram of June 26, 1948, to Mr. Gallagher. That Mr. Gallagher did cause the court below to direct payment of the funds to Mrs. Drier and

himself, over the protests of counsel for appellant, is clear. How then can he brand as untrue the statement in effect that he did procure an order of court "permitting the money to be paid out only to himself and his associates." (App. p. 24).

The statement made by Judge Ben Moore, quoted on page 28 of appellees' brief and acquiesced in by counsel for appellant, that the money was gotten out of the registry of the court and removed from the jurisdiction of the court is true, although branded by appellees as being false. Counsel for appellant contends that the funds actually are not removed from the registry of the court until the check evidencing the same has been cleared, because until that occurs, the check may be withdrawn or payment thereof may be stopped. Appellees seem to view the situation from the angle that the minute the check is issued, the funds actually are withdrawn from the registry of the court. As before stated, the record discloses that, while the check may have been actually received by Mr. Gallagher or Mr. Hendry on June 30, 1948, it was not deposited until July 1, 1948. In fact, Mr. Hendry, when his deposition was taken, said he "went down and got the check", but could not recall whether it was June 30 or July 1, 1948, and "brought it back to the office and put it in the safe." (App. pp. 70, 71).

Appellant's position is borne out by the portion of the record which immediately follows the quotation on page 28 of appellees' brief. The record (App. p. 25) shows the following:

"Mr. Merrick: Those are substantially the facts * * *. "Now, as to the other facts, your Honor is correct that the funds had not actually been withdrawn from the Registry of the Court at the time the motion to modify the judgment and make it conform to the original agreement and to the original motion for approval of that agreement was pending; that is during the pendency of that motion, the funds were re-

moved from the Registry of the Court and from the jurisdiction of the Court * * *".

Date of Withdrawal of Funds

The first sentence beginning on page 29 of appellees' brief reads:

"The removal of the funds from the Registry of the Court was done pursuant to the order of affirmance prior to July 1, the date that appellant claims he filed and served his motion."

The inaccuracy of that unsworn statement is demonstrated by Mr. Hendry's testimony under oath that he could not recall whether he received the check on June 30 or July 1, 1948 (App. p. 70). Furthermore, as already shown, the check was not deposited in the bank until July 1, 1948 (App. p. 54). It is clear, therefore, that the funds were not withdrawn from the registry of the Court until after appellant's motion was served on July 1, 1948, about 10:15 A. M., and filed in the clerk's office immediately thereafter.

Procuring Additional Court Order

In the first paragraph beginning on page 29 of appellees' brief, the following appears:

"Likewise, the statement in appellant's brief (pages 8 and 9) that Mr. Gallagher stated to Aron's attorney that no additional court order had been obtained and that none was necessary while an exparte order * * * was prepared by Messrs. Gallagher and Hendry is contrary to the fact."

Appellant's statement that Mr. Gallagher represented that no additional court order had been obtained and none was necessary is under oath (App. p. 44), while the statement in appellees' brief that appellant's statement is untrue is not sworn to. Therefore, there is nothing in the record to support the charge made by appellees in their brief that appellant's statement is untrue. The contrary is shown by the record.

Additional Funds in Registry

At the bottom of page 29 and top of page 30 of appellees' brief, the following appears:

"Another perversion of the truth and misleading statements of the appellant will be found on page 20 of his brief wherein he states that the appellant in the Court below, on the argument on appellant's motion to have appellees declared in contempt before Judge Ben Moore brought to the attention of Judge Moore:

"* * * in the very hope that this would afford a way out for the appellee and her attorneys * * *" the fact that there was on deposit in the Registry of the Court at that time an amount of money sufficient to discharge appellant's claim if he prevailed upon those claims. This statement is sheer hypocrisy on the part of appellant, and the argument is illogical."

It is the distinct recollection of appellant that he did state to Judge Moore that there were additional funds in the registry of the court out of which his claim could be paid, but that does not seem to appear in the record. However, the following appears at page 78 of the Record (not printed in the appendix):

"Mr. Merrick: * * *

"I filed a motion following the payment of \$27,000.00 odd dollars in the Registry of the Court to refer to the Auditor the question of determining to whom that fund belongs and in what proportion. I have not made a motion to refer the matter to the Auditor with respect to the \$11,000.00 odd dollars paid in the Registry of the Court in February but I assume if reference is made it should include the whole funds still in the Registry of the Court amounting, roughly, to \$57,000.00."

* * *

"The Court: Why do you think that it is proper to refer the \$27,000.00 and the \$11,000.00 to the Auditor?"

"Mr. Merrick: Because a certain part of those funds are payable under the original awards procured

by Mr. Aron; certainly he has a certain right therein as his fees."

In point of time, the foregoing occurred before (as appellees state at page 31 of their brief)

"* * * Judge Ben Moore in the hearing before him solicited" (elicited is probably what is meant) "from Mr. Gallagher the information which appellant's counsel claims he suggested to him * * *".

The statements of appellant's counsel certainly apprised the Court that there was a sum of about \$57,000.00 in the registry of the Court below.

Appellant's counsel's attitude in this matter is reflected by his opening statements to Judge Moore, which appear at pages 17 and 18 of the Appendix.

Defiant Attitude of Appellees

There is a rather remarkable statement in appellees' brief at the bottom of page 31 and top of page 32, as follows:

"We do wish, however, now to go on record before this Court, in stating that even if the motion had been served on appellees, as claimed, before the funds were paid out, appellees would have acted exactly as they did act and would not have waited for that frivolous and void motion to be acted upon by the Court below, knowing that the Court had no jurisdiction to grant such a motion. * * *"

Judge Moore did not consider the motion frivolous and said, speaking to Mr. Gallagher:

"Suppose you had had the money in your possession and this motion to modify was served upon you and you paid out the money and then the motion to modify was sustained, then what would be the situation? And how did you know that the motion to modify wasn't going to be sustained?" (App. pp. 26, 27)

Judge Moore also said:

"I think Mr. Gallagher should be permitted, if he cares to do so, to file his affidavit in this case carrying out what he has just said in argument" (App. p. 28)

* * * *

"What is your desire in regard to that, Mr. Gallagher? Do you wish to file an affidavit?"

"Mr. Gallagher: Concerning these facts?"

"The Court: Yes."

"Mr. Gallagher: I want to check a little more law and see if this point is of any consequence; if I feel it is, I am perfectly willing to file an affidavit;—these people are dealing with dates which follows the events in this case". (App. p. 29)

A few minutes thereafter the Court advised Mr. Gallagher that he would recess for lunch in order that he might, if he desired, file an affidavit. After the recess, the court stated that he believed the question was, when the court recessed for lunch, whether Mr. Gallagher wished to file an affidavit or give any testimony. Both appellant and his counsel had indicated they were ready to testify under oath. Mr. Gallagher then said:

"Your Honor, I cannot recall the facts sufficiently to make an affidavit or give testimony until I look at my files. After all, it is sometime ago, and the point involved here is dates." (App. pp. 29, 30)

These statements were made after Mr. Gallagher had informed the court definitely that the money had been received and paid out before the motion was served and had twice said that the motion was received in his office on July 2, 1948 (App. pp. 26, 27). The only dates involved were June 30, and July 1 and 2, 1948, as to which he already had made positive statements not under oath.

Appellees in their brief charge appellant and his attorney with "perversion of the truth" (pp. 25, 29) and "untrue statements" (p. 24, 28). It seems to appellant and his counsel that the shoe is on the other foot, so to speak. The

record discloses that statements under oath by appellant have been filed to support the allegations concerning the conduct and misconduct of appellees, while appellees have never denied under oath any of the allegations made against them; in fact, they have yet to file a single statement or allegation under oath concerning the charges against them. Furthermore, Mr. Gallagher, in the respects already pointed out, has made statements contrary to the record, and twice (App. pp. 26 and 27) has said that the motion to modify the judgment was served on him on July 2, 1948, when, as a matter of fact, the affidavit of appellant (App. p. 43), and the certificate of service state definitely that service was made on July 1, 1948 (App. pp. 37, 38), and the record shows that the motion and the certificate of service thereto attached were filed in the office of the clerk of the court below on July 1, 1948 (App. p. 36). Mr. Gallagher further said "I made a notation of the date and time the motion was served on me 'July 2nd'" (App. p. 27). He did not produce the "notation", and an hour or two later told Judge Moore he could not "recall the facts now sufficiently to make an affidavit or give testimony until I look at my files." Mr. Gallagher also said in his statements to Judge Moore that the check had been received on June 30, deposited in the bank on July 1, and sent directly to the Treasury and the proceeds were withdrawn before the motion was filed, and that the funds were "in Mrs. Drier's hands" (App. p. 26). A few minutes later he said "The situation as it was then was we had received the money, the money was in our hands, the Register's check had been cashed, I had withdrawn the proceeds on a counter check and all that was done before this motion was filed" (App. p. 27). Judge Moore then said "You told me a while ago it was paid to Mrs. Drier" * * * Which is true—in your hands or Mrs. Drier's", to which Mr. Gallagher replied that the funds had been drawn and turned over to Mrs. Drier immediately (App. p. 27). As already shown, the record discloses that the check was

deposited on July 1, 1948, and that it was paid "over the counter" at the Treasury to a runner from the Union Trust Company on July 2, 1948.

These matters clearly show that it ill behooves Mr. Gallagher to mention "perversion of the truth" and "untrue statements".

CONCLUSION

Appellees discuss in their brief many collateral matters having no bearing whatever on the issue involved. They question the motives of appellant and charge him and his creditors with unjustly tying up Mrs. Drier's funds many years and state in effect that his apparent purpose in filing the motion to modify the judgment in question was further to prevent Mrs. Drier from receiving money to which she was entitled. Appellant, of course, denies any purpose other than the protection of his rights, and invites attention to the fact that under the agreement between Mrs. Drier and himself he never claimed ownership of the entire fund, but only his just portion thereof. He could not, therefore, be trying to prevent her from receiving her share of the funds under the agreement. Mrs. Drier has received over \$36,000.00 of the funds deposited in the registry of the court and which the settlement agreement between her and appellant provided in effect should be equally divided between them, while appellant has yet to receive a single cent from those funds, the ownership of which was claimed by both and which was intended to be decided by the terms of the settlement agreement of May 2, 1945, which was presented to the court through Mr. Gallagher and approved by the court upon appellees' representations and urging. There was nothing to prevent Mr. Gallagher, upon receiving the check from the registry of the Court below on June 30, 1948, from paying over to Mrs. Drier her portion of the funds and holding the remainder for appellant, or, if he felt that he could not pay the funds over to appellant

without an order of court, he could have held them until that was obtained. Good faith would seem to have required him to do so.

Under all the circumstances, appellant respectfully submits that appellees, by their actions in removing and assisting in the removal of the subject-matter of a pending proceeding from the jurisdiction of the court defied the power of the court, and, therefore, were in contempt. They further demonstrate by the terms and tone of their brief that they still have little if any regard for the power and dignity of the court before which Mrs. Drier is a litigant and Messrs. Gallagher and Hendry are practicing lawyers. They seem to have as little regard for the power of the court below as they do for the obligations of a contract to which Mrs. Drier is a party and which Mr. Gallagher assisted in preparing and causing to be executed and presented to the court for approval.

The order appealed from, therefore, should be reversed.

Respectfully submitted,

HAROLD G. ARON,

RICHARD L. MERRICK,

Attorneys for Appellant.